92-403

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1992

TEAMSTERS LOCAL UNION NO. 688, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Respondent.

APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. District Court for the Eastern District of Missouri and the U.S. Court of Appeals for the Eighth Circuit exceeded their authority in reviewing arbitration decisions based on collective bargaining agreements as set forth in the Steelworkers Trilogy when they vacated an arbitration award based on review of the merits of the grievance?

2. Whether this case "opens the floodgates" for federal judicial review of every routine arbitration decision as it undermines the integrity and value of industrial labor arbitration at a time when the federal court system is already heavily overloaded?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court.

Teamsters Local Union No. 688 member Kenneth Youngermann was the grievant in the original arbitration which gave rise to the federal court decisions here sought to be reviewed.

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vs.

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Respondent.

APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the Decision of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on March 26, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Missouri is reported at 959 F.2d 1438, No. 91-2876 (8th Cir. (Mo.), Mar. 26, 1992), and is reproduced at Appendix C attached hereto.

The unreported opinion of the United States District Court for the Eastern District of Missouri overturning the arbitration opinion is reproduced at Appendix E attached hereto.

The arbitration opinion granting reinstatement to the grievant and finding no violation of the Last Chance Agreement is reproduced at Appendix H attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Missouri was entered on March 26, 1992. The Court of Appeals denied

Petitioner's timely Petition for Rehearing En Banc on May 7, 1992. By local rule, the Eighth Circuit Court of Appeals treats all Petitions for Rehearing En Banc as including a Petition for Rehearing En Panel. 8th Cir. R. 35A(c)(4), 8th Cir. R. 40A(b)(2). An application for an extension of time until September 4, 1992 to file this Petition for a Writ of Certiorari was granted on July 30, 1992 by the Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 173(d) provides:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

STATEMENT OF THE CASE

Petitioner Teamsters Local Union No. 688 (hereafter referred to as "the Union") was the collective bargaining representative of the drivers employed by Respondent Coca-Cola Bottling Company of St. Louis, Inc. (hereafter referred to as "the Employer") in the St. Louis metropolitan area. APP. K-5. The Employer and the Union were parties to a collective bargaining agreement which contained a mandatory grievance procedure culminating in final and binding arbitration. APP. K-16 thru 20.

The original dispute involved a series of grievances filed by Kenneth Youngermann, a driver employed by the Employer under the terms of the collective bargaining agreement. APP. I-1. The grievances were filed in some instances in response to discipline imposed on Youngermann by the Employer, including his termination on May 1, 1989. APP. I-1 thru 3.

The parties submitted ten (10) disputes arising out of these grievances to arbitration

pursuant to the terms of the collective bargaining agreement. APP. I-1. Extensive evidentiary hearings were held, Id.; and on September 17, 1990 the arbitrator issued his Opinion and Award denying the grievances in four (4) of the disputes, denying the grievance in part in one (1) of the disputes, sustaining the grievances in five (5) of the disputes, and ordering that Youngermann be reinstated and made whole. APP. I-76.

The crux of the instant lower federal court decisions has to do with the last two disputes (Arbitrations Nos. 10 and 11) dealing with Youngermann's discharge which the arbitrator found to be improper. The essential facts leading up to the discharge may be briefly summarized.

On September 6, 1988 representatives of the Employer and the Union (including Youngermann) met to discuss what disciplinary penalty (if any) should be imposed on Youngermann for alleged violation of a work rule. At that time

Youngermann was employed as an "Extra Relief Driver" with no regularly assigned route. The Employer drafted a document entitled Disciplinary Action Notice which reads as follows:

> Pursuant to the Union's recommendation on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.
>
> Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary ac-

tion for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. APP. J-1 thru 3, I-15 thru 17.

The document was signed by two supervisors and two stewards, but Youngermann refused to sign it. APP. J-2, I-17. Shortly thereafter, on December 9, 1988, Youngermann was given a forty day disciplinary suspension for poor work performance in violation of Company Rule A-25 which the arbitrator upheld as justified. APP. I-64 thru 66.

The facts relating to Youngermann's discharge began on April 19, 1989. At that time, two supervisors (Roustio and Ryan) had an "in-

structional" or "counseling" (as opposed to disciplinary) meeting with Youngermann about work-related matters in the presence of a steward. APP. I-43. The discussion initially covered several subjects, but eventually became focused on the right of Youngermann to physically count his coins when accounting for cash at the end of the day rather than relying on the Employer's change counters. APP. I-45 thru 46. One of the supervisors (Roustio) lost his temper, pounded his desk and suspended Youngermann. When Youngermann asked why he was suspended, Roustio responded, "We start with insubordination." APP. I-44 thru 46. Roustio later candidly admitted that he did not have just cause for the suspension. APP. I-45.

Immediately following this meeting, three prior unrelated events surfaced: Youngermann's inadvertent failure to clock out on April 14, 1989, APP. I-43, 70; trash or debris which had been left in the truck Youngermann had driven on that day, APP. I-43; and an inadvertent transpo-

sition of truck numbers on a DOT form. Id. These three "infractions" were not brought forward by Ryan until after the April 19 meeting, and were not discussed at the meeting, APP. I-70 thru 72; and the Employer relied on them cumulatively to justify its termination of Youngermann on May 1, 1989. APP. I-72. The arbitrator found that the reasons which the Employer relied on to justify the discharge were "contrived", APP. I-71 thru 72; that the debris left in the truck and transposition of numbers on the DOT form did not constitute violations of Category A rules, APP. I-73; and the inadvertent failure to clock out was a de minimis violation. APP. I-73. On this basis, the arbitrator invalidated the discharge, and ordered that Youngermann be reinstated and made whole. APP. I-74 thru 75.

The Employer filed suit to vacate the arbitrator's award. Federal jurisdiction was invoked under 28 U.S.C. § 1331 and 1337 and 9 U.S.C. § 10. The District Court vacated the

arbitrator's award on the basis that the "de minimus" [sic] violation was adequate basis for the discharge under the September 6 agreement. APP. F-8 thru 9. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's decision on the same grounds. APP. C-16 thru 17. This petition for writ of certiorari followed in due course.

REASONS FOR GRANTING THE WRIT

United States Supreme Court Rule 10 includes as reasons for granting Writ of Certiorari the correction of a U.S. Court of Appeals decision that has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" as well as the correction of a U.S. Court of Appeals opinion that "has decided a federal question in a way that conflicts with applicable decisions of this Court".

A. THE LOWER FEDERAL COURTS' DECISIONS UNDERMINE THE PRINCIPLES ESTABLISHED BY THIS COURT IN THE STEELWORKERS TRILOGY.

The National Labor Relations Act is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. The Labor Management Relations Act of 1947, 29 U.S.C. § 173 (d), provides that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement". United Paperworkers International Union vs. Misco, Inc., 484 U.S. 29, 37, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Experience has demonstrated that "collective bargaining agreements which provide for final and binding arbitration of grievances and disputes arising thereunder, as a substitute for industrial strife, contribute significantly to the attainment of this statutory objective". Carey vs. Westinghouse Electric Corp., 375 U.S. 261,

271, 64 S.Ct. 401, 11 L.Ed.2d 320 (1964); quoting International Havester Co., 138 N.L.R.B. 923, 925-926 (1962).

Over 30 years ago, this court prescribed a "judicial non-interventionist" policy in the Steelworkers Trilogy to advance the policies and goals of the federal labor legislation. United Steelworkers of America vs. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America vs. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and United Steelworkers of America vs. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.-2d 1424 (1960).

In 1986, this Court's decision in AT & T Technologies vs. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed-.2d 648 (1986) emphasized the continuing value of the Steelworkers Trilogy.

> "These precepts have served the industrial relations community well, and have led to continued reliance on arbitration rather than strikes or lockouts as the

> preferred method of resolving disputes arising during the term of a collective bargaining agreement. We see no reason . . . to question their continuing validity." 475 U.S. at 646.

However, the decisions of the District Court and the Court of Appeals in this case directly conflict with, disregard and undermine the principles set forth in the Steelworkers Trilogy.

American Manufacturing, supra, established the principle that the federal courts "have no business weighing the merits of a grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim". 363 U.S. at 567-568. In 1987, this Court expanded the policy of judicial non-intervention so that as long as an arbitrator is "even arguably construing or applying the contract. . . the court may not review the merits of his award". Misco, 484 U.S. at 38.

In the present case, the lower federal courts plainly disregarded the "non-interventionist" policy. The District Court and Court of Appeals ignored the arbitrator's interpretation of the merits and imposed their own contrary interpretations. In examining the facts and construing the language of the Last Chance Agreement, "any such offense of a similar and/or like nature in violations of Category A Rules and Regulations will warrant your termination of employment", the arbitrator found that there was "no factual or contractual basis for any discipline". APP. J-3, APP. I-74. The arbitrator clearly stated that no "triggering event" had occurred, there was not "any such offense of a similar and/or like nature in violation of Category A". APP. I-72 thru 74. Misco, supra, 484 U.S. at 37-38. However, the District Court and Circuit Court of Appeals substituted their own constructions of the language "any such offense of a similar and/or like nature in the violations of Category A Rules and Regulations"

and their own interpretation of the facts in deciding that the "triggering event" had occurred. APP. F-8 thru 9, APP. C-16 thru 17.

The language "similar and/or like nature" is certainly susceptible to multiple interpretations as the words "similar" and "like" are highly subjective terms. Under Misco, supra, the parties authorize the arbitrator to give meaning to the language of the agreement and a court should not reject an award on the ground that the arbitrator gave the wrong meaning to the contractual language. 484 U.S. at 78. Furthermore, under Misco, as long as the arbitrator is "even arguably construing or applying the contract", that a court is convinced he committed error does not suffice to overturn his decision. 484 U.S. at 30. Here, the arbitrator defined the scope of an offense of "similar and/or like nature". APP. I-63 thru 64. Then the arbitrator determined that the facts alleged did not constitute a violation under his definition. APP. I-70 thru 75. Thus, the arbitrator

was clearly basing his decision on the contract, and the arbitrator's decision must stand.

Enterprise Wheel, supra, asserted the principle that a court may not overturn an arbitration decision based on a finding that the arbitrator failed to apply 'correct principles of law'. This Court found that acceptance of such view "would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract". This plenary review by a court of the merits would make meaningless the provision that the arbitrator's decision is final, for in reality it would almost never be final" 363 U.S. at 598-599. In complete disregard of this policy, the District Court and Court of Appeals rejected the arbitrator's construction and applied what they believed to be the correct principles of law in reinterpreting the last chance agreement. The arbitrator considered the last chance agreement to be an extension of the collective bargaining agreement and read both together. APP.

I-63 thru 64. However, the District Court and Court of Appeals rejected this methodology, instead asserting that the correct principle of law dictates that a last chance agreement supercedes a collective bargaining agreement. APP. F-6 thru 8, APP. C-10 thru 12.

Warrior and Gulf, supra, asserted that a "labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment". 363 U.S. at 581-582. The "labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it". 363 U.S. at 582. "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he

cannot be similarly informed". 363 U.S. at 582. When an arbitrator interprets a collective bargaining agreement "he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations". Enterprise Wheel, supra, 363 U.S. at 597.

In the present case, the District Court and Court of Appeals ignored all of these principles set forth in the Steelworkers Trilogy. The arbitrator based his finding that failure to clock out was a de minimis act insufficient to constitute a contract violation. APP. I-73 thru 74. However, the District Court and Court of Appeals exceded their authority by rejecting the arbitrator's opinion based on the fact that de minimis acts were not specifically set out in the contract [sic]. APP. F-8 thru 9, APP. C-14 thru 16.

Over the past ten years, there has been an Eight Circuit trend away from practicing the judicial methodology established by the Steelworkers Trilogy. Through the mid-1980's the Appellate Court showed deference to arbitration. At that time, arbitration opinions were upheld upon a showing that the arbitrator based his opinion on interpretation of the collective bargaining agreement. See: Aircraft Mechanics Fraternal Ass'n vs. Ozark Air Lines, Inc., 597 F.2d 1155 (1979); Rainbow Glass Co. vs. Local Union No. 610, 663 F.2d 814 (1981); Vulcan-Hart Corp. vs. Stove, Furnace & Allied Appliance Workers International Union Local No. 110, 671 F.2d 1182 (1982); Daniel Construction Co. vs. International Union of Operating Engineers, Local 513, 738 F.2d 296 (1984); McGraw Edison, Wagner Div. vs. Local 1104, International Union of Electrical, Radio & Machine Workers, AFL-CIO, 767 F.2d 485 (1985). By the late 1980's, the Appellate Court was merely giving lip-service to the Steelworkers Trilogy. That court's present

methodology consists of mentioning judicial deference, then proceeding to closely scrutinize the merits of the arbitration. See: Trailways Lines, Inc. vs. Trailways Inc. Joint Council, 807 F.2d 1416 (1986); Inter-City Gas Corp. vs. Boise Cascade Corp., 845 F.2d 184 (1988); George A. Hormel & Co. vs. United Food & Commercial Workers, Local 9, AFL-CIO, 879 F.2d 347 (1989); Northwest Airlines, Inc. vs. International Ass'n of Machinists & Aerospace Workers, Air Transport District Lodge #143, 894 F.2d 998 (1990).

The instant decisions of the District Court and the Court of Appeals contradict, disregard and undermine the principles set forth by this court in the Steelworkers Trilogy as well as established federal labor policy. These lower federal court decisions set a dangerous precedent for the review of arbitration decisions. Final and binding labor arbitration promotes industrial stability. By applying this heightened scrutiny to arbitration decisions, lower federal court precedents such as these discour-

age faith in collective bargaining and arbitration and encourage federal court litigation. The lower federal courts here undermined this court's policies of deference to the arbitrator's findings of facts, contractual construction and use of sources. These dangerous precedents must be reviewed by this Honorable Court in order to preserve the integrity of the principles of limited review of arbitrators' awards often expressed by this Court.

B. THE LOWER FEDERAL COURT DECISIONS "OPEN THE FLOODGATES" FOR JUDICIAL REVIEW OF EVERY ROUTINE ARBITRATION DECISION AT A TIME WHEN THE FEDERAL COURTS ARE ALREADY HEAVILY OVERBURDENED.

In a strongly worded and well reasoned dissent in the Court of Appeals decision, Judge Henry Woods warned that the "troubling repercussion of the majority decision is that it '<u>opens the floodgates</u>' for appellate review of every routine arbitrator's award and effectively negates the 'binding' aspects of binding arbi-

tration".[1] (Emphasis Added) Labor arbitration alleviates the federal caseload problem by promoting the peaceful settlement of disputes through private forums. Encouragement of appeals to federal courts from arbitration as well as discouraging use of arbitration will grossly compound the current federal caseload crisis. (See APP. L & M for a statistical analysis of increased federal caseloads due to undermining of arbitration.)

In a February 1989 address to the American Bar Association, Chief Justice Rehnquist emphasized that the Federal Courts are "straining under the workload".[2] The Chief Justice warned that the war on drugs would fail if the federal judiciary is not given the judgeships necessary

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[1]App. C, at 20-21.

[2]Chief Justice Rehnquist proposed that federal jurisdiction must be reduced because the federal judiciary cannot handle the work. Marcotte, Rehnquist: Cut Jurisdiction, 75 A.B.A.J. 22, April, 1989.

to do the job.[3] In a time of such crisis, lower federal court decisions such as those below threaten to compound the caseload problem by both discouraging the use of arbitration and increasing the number of appeals from arbitration to the federal courts.

The number of new judgeships has not kept pace with the caseload. As a result, an individual appellate judge today handles an average of 6.3 times the number of cases handled in 1900; 4.9 times the number of cases handled in 1950; and 2.1 times the number of cases handled in 1970.[4] A recent survey by the Federal Courts Study Committee of federal court judges found that 46% of the judges responding complained

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[3]Chief Justice Rehnquist called for the addition of new federal judges to handle the caseload. Greenhouse, Chief Justice Makes Plea for More Federal Judgeships to Help Fight Against Drugs, N.Y. Times, Jan. 1, 1990, at 10, col. 1.

[4]Federal Courts Study Committee: Working Papers and Subcommittee Reports, Volume II, July 1, 1990; "A Preliminary View of the Problems that Have Led to Proposals for Change", at 7.

that caseload pressures "often" or "usually" have an adverse effect on how they do their work with an additional 39% admitting that such pressures "sometimes" affect their work adversely.[5]

The federal caseload crisis will compound when the economy recovers from the recession. Filings closely follow economic trends in prior years. "Caseloads grew little in years following the recessions of 1974-1975 and 1980-1982, and shot up following years of economic prosperity. . . The economy has a magnifier impact on filings: each 1 per cent increase in the economy produces about 1.6 per cent increase in filings".[6] Clearly action must be taken to halt the federal caseload crisis before economic recovery from the current recession spurs a new wave of federal litigation.

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[5]Federal Courts Study Committee: Working Papers and Subcommittee Reports, Volume I, July 1, 1990; "Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States", at 41-42.

[6]Marvell, Caseload growth - past and future trends, 71 Judicature 154, Oct.-Nov., 1987, at 155.

The crisis has been felt at all levels of the system from district courts to this Court. Between 1960 and 1988 there was a 99% increase in district court filings. Over the same time there was more than a 50% increase in the average length of district court trials, from 2.2 days to 3.4 days. By putting these numbers together, one can see that the number of trial days in the district courts has tripled since 1960.[7]

The federal courts of appeals have experienced even much more substantial caseload growth than the district courts. Total filings in federal appellate courts rose by 1440% from 2,730 to 42,033 between 1945 and 1991.[8] Filings per appellate judge rose by 446% over the same

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[7]See note 5, supra, at 34.

[8]Federal Courts Study Committee: Working Papers and Subcommittee Reports, Volume II, July 1, 1990, Flanagan "Appellate Court Caseloads: A Statistical Overview", September 14, 1989, at p. 1 and Table 1; 1991 ANNUAL REPORT OF THE DIRECTOR, at 2.

time period from 46 per judge to 251 per judge.[9] Even accounting for the growth in the size of the courts, the average court of appeals judge hears between five and six times the number of cases today than an appeals judge in 1945.[10]

If the future need for appellate judges is projected on the basis of trends from 1970-1989 then 288 judges will be needed by 1994; 332 by 1999; and 423 by 2009. Under this projection, the average circuit should have 24 judges by 1994; 28 by 1999; and 35 by 2009. The 5th Circuit would reach 54 judges by 2009, and the 9th 67.[11] Circuits of such large size may be unworkable.

In a 1989 address to the American Bar Association, Chief Justice Rehnquist asserted that even if additional district and circuit court

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[9]Id.

[10]See note 4, supra, at 31.

[11]Federal Courts Study Committee: Working Papers and Subcommittee Reports, Volume II, July 1, 1990, "Report of the Subcommittee on Structure to the Federal Courts Study Committee", at 30.

judges can manage the federal caseload, the U.S. Supreme Court cannot accommodate it.[12] The caseload explosion threatens the Supreme Court's role as the final authority on national law. The Court is unable to give full review to more than 150 cases per year. As court of appeals decisions increase, there is a corresponding decline in the percentage of cases that the Supreme Court is able to review. In 1989, the Court granted 142 petitions for certiorari which equaled 5% of the total petitions for certiorari for the year and 0.7% of the terminations on merits by the Circuit Courts of Appeals.[13] Thus, since the Supreme Court grants certiorari only in a few cases, the "courts of appeals function as the final arbiters of federal law in the overwhelming bulk of cases".[14]

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[12]See note 2, supra.

[13]Federal Courts Study Committee Report, April 2, 1990, at 110.

[14]See note 4, supra, at 5.

Several problems have resulted from the federal caseload boom including intercircuit conflicts, intracircuit conflicts, judge and chambers overload, judicial bureaucracy, and sacrificed quality.[15] Encouraging significant additions to the federal court caseload by undermining this Court's policies on judicial review of arbitration decisions will compound these problems immeasurably.

Since the Supreme Court no longer accepts and decides many cases where there is a conflict between circuits, legal principles differ in different areas of the country.[16]

The use of shifting three-judge panels in today's mutli-judge courts of appeals makes it difficult to harmonize precedents within a particular circuit.[17] The number of judges within a circuit as well as the complexity of issues have multiplied the possibility for

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[15] Id., at 4.

[16] Id., at 4-5.

[17] Id., at 6.

subtle as well as major differences between panel opinions within one circuit.[18]

As the federal caseload increases, judges become bureaucrats presiding in a supervisory capacity over staff members who do the real judicial work.[19] The Federal Courts Study Committee poll found that 63% of judges that responded rely on clerks to do work that they should do themselves.[20] The Committee's study found that 39% of judges that responded rely on staff attorneys to do work that they should do themselves.[21]

The Federal Courts Study Committee found that judges often lack the time to perform the essential responsibilities of their positions. Of those who responded, 10% said that they "never" have time to master the relevant issues. 13% "never" or "almost never" have time to study

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[18]Id.

[19]Id., at 9.

[20]See note 5, supra, at 71-72.

[21]Id., at 74.

difficult procedural issues before ruling, and 12% "never" or "almost never" have time to keep informed of developments in their Courts of Appeals and the Supreme Court.[22]

One shortcut that has helped alleviate the caseload crisis is deciding more cases without oral argument. Since 1975, the number of appeals decided without oral argument has risen from 30% to 50% nationally.[23] The Federal Courts Study Committee found that 53.5% of judges responding acknowledged that cases are decided without oral argument that could benefit from it.[24]

Another shortcut used to combat the caseload pressures has been to publish less opinions. In 1987, 61% of all appellate decisions went unpublished.[25] The Federal Courts Study Committee found that 41.4% of judges responding acknowl-

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[22]Id., at 41.

[23]See note 11, supra, at 27.

[24]See note 5, supra, at 79.

[25]Id., at 81.

edged that opinions are at least "sometimes" not published when they should be, while 12.1% claimed that opinions are "often" or "usually" not published when they should be.[26]

The Federal Courts Study Committee concluded that the procedural reforms and the increase in per judge workloads have gone as far as they can in dealing with caseload increases.[27] Also, the Committee warned that "per judge productivity is close to the maximum . . . further acceptable efforts to enhance productivity will yield sharply diminished returns".[28]

Labor arbitration is a well-established and functioning institution that relieves the federal court system of many thousands of cases per year. Thus, in this time of crisis, the integrity and value of labor arbitration must be preserved. Erosion of labor arbitration "opens the floodgates" for appellate review of every

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[26]Id., at 87.

[27]See note 8, supra, Flanagan, at 2.

[28]See note 13, supra, at 115.

routine arbitrator's award and effectively negates the "binding" aspects of "binding arbitration" as Judge Woods warned.[29] In an already grossly overburdened system, the addition of any cases to the federal caseload that have available and adequate forum elsewhere must be discouraged.

Also, responsibility to taxpayers dictates that the rise in federal court caseloads be stemmed. Between 1980 and 1988, the federal courts budget increased by 130% from $606 million to $1395 million in terms of 1988 constant dollars.[30]

The combined effects of increased federal appeals from arbitration and more cases brought directly in federal court could be devastating. With all the problems the federal courts currently endure, the straw that breaks the camel's back may not be far away. The federal courts

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[29]APP. C, at 20-21.

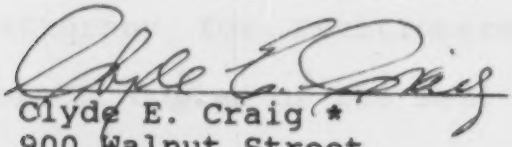
[30]See note 4, supra, at 10.

for years have been helping themselves as well as litigants by encouraging peaceful settlement of disputes in other forums. Such alternative dispute resolution helps avoid intercircuit conflicts, intracircuit conflicts, judge and chambers overload, judicial beaurocracy, and sacrificed quality. Thus, the value of alternative dispute resolution forums such as binding labor arbitration must be preserved and protected. Because of lower federal court decisions such as this that "open the floodgates", the federal courts are on the verge of a labor case boom. Failure to supress such boom will be disastrous. Thus, this court must grant certiorari to reaffirm the principles established in the Steelworkers Trilogy and reassert stabilizing federal labor policy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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August, 1990

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CERTIFICATE OF SERVICE

The undersigned attorney for Petitioners acknowledges that three (3) copies of the Petition for Writ of Certiorari to the Supreme Court of the United States were served on the following attorneys by first-class mail, postage prepaid, on this 2nd day of August, 1992:

John J. Moellering
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Clyde E. Craig

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

Subscribed and sworn to before me this 2nd day of ~~August, 1990~~ September, 1992.

Christine M. Dollarg
Notary Public

My Commission Expires:
October 4, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-2876EMSL

Coca-Cola Bottling of St. Louis,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Teamsters Local Union No. 688,	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

May 7, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2876

Coca-Cola Bottling Company of St. Louis, Appellee, v. Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, Appellant.	)	Appeal from the United States District Court for Eastern District of Missouri

PETITION FOR REHEARING EN BANC

Comes now Appellant/Petitioner Teamsters Local Union No. 688, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, by attorney, and, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petitions the Court for a rehearing en banc to review the

divided decision of a panel of this Court issued March 26, 1992 affirming an order of the United States District Court for the Eastern District of Missouri vacating an arbitrator's award rendered pursuant to a collective bargaining agreement. Counsel's statement pursuant to Rule 35(C)(2) of the Rules of Appellate Procedure of the Eighth Circuit is attached hereto.

In summary, Appellant urges the Court to grant the Petition for Rehearing En Banc because the refusal of the District Court and the divided panel of this Court to accept and abide by the principle of judicial deference to arbitrators' awards will, in the words of dissenting Judge Woods, "[open] the floodgates for appellate review of every routine arbitrator's award. . . ." Slip Opinion, pg. 11, attached hereto as Appendix A.

BACKGROUND

In an unpublished opinion issued June 28, 1991, the District Court, Hon. Jean Hamilton presiding, issued an order vacating an arbitra-

tor's award issued pursuant to a collective bargaining agreement ordering that a discharged employee be reinstated and made whole. The District Court's Memorandum and Order is attached hereto as Appendix B.

The crux of the case on appeal has to do with an agreement reached by the employer of the discharged employee and the Union Stewards on September 6, 1988 whereby the employee was not to be discharged for certain infractions on the following conditions:

> Pursuant to the Union's recommendation on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1

of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis.

This agreement, sometimes referred to as a Last Chance Agreement (LCA), was by its terms a

notice that the employee could be discharged for subsequent violations of company rules which were "of a similar and/or like nature. . . ."

On May 1, 1989 the employee was discharged for three unrelated "violations": (1) failure to clock out after his shift on April 14, 1989, (2) leaving trash or debris in the truck he had driven that day, and (3) the inadvertent transposition of truck numbers on a safety form. The arbitrator found that the employee was discharged for the three violations cumulatively, and that he would not have been discharged "for any one of the infractions had it been the only infraction." Arbitrator's Decision, pg. 49, attached hereto as Appendix C. He also found that the employer had failed to prove two of the violations: leaving trash in the truck and transposition of numbers on a safety form; and the third violation, failure to clock out, was de minimis and insufficient in itself to sustain the discharge. Ibid. at 49-50.

The District Court and majority of the

panel of this Court in vacating the arbitrator's award rejected his analysis of the Last Chance Agreement where he found that the "triggering event" for the discharge had not occurred because the "violations" were not of a "similar and/or like nature" within the meaning of the Last Chance Agreement. Ibid. at 47-50. As the dissenting opinion of Judge Woods points out, this flies in the face of the firmly established principle of judicial deference to arbitrators' awards. Appendix A, pg. 11.

APPLICABLE LEGAL PRINCIPLES

There is a strong federal policy favoring arbitration of labor disputes. Section 203(d), Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 173(d); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 566, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). Thus, the standard of review of an arbitrator's award is deferential: an award is entitled to enforcement so long as it "draws it essence" from the collective bargaining agree-

ment. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); Franklin Electric Co. v. UAW Local 1000, 886 F.2d 188, 192 (8th Cir. 1989). And an award "draws it essence" from the agreement unless it may be said with positive assurance that the contract is not susceptible of the interpretation given to it by the arbitrator, George A. Hormel Company v. United Food & Commercial Workers Local 9, 879 F.2d 347, 350 (8th Cir. 1989). This is because it is the arbitrator's decision which was bargained for, and it is the arbitrator's decision which must be enforced.

> "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual and legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the con-

> tract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." Paperworkers v. Misco, 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

Consistent with these principles, an agreement must be broadly construed and all doubts resolved in favor of the validity of the award. Walsh v. Union Pacific Railroad Company, 803 F.2d 412, 414 (8th Cir. 1986).

Thus, the Courts have no business weighing the merits of a dispute, or attempting to determine whether the arbitrator resolved it correctly, American Manufacturing Co., 363 U.S. at 568; Enterprise Wheel and Car Corp., 363 U.S. at 596; Daniel Construction Company v. Operating Engineers Local 513, 738 F.2d 296, 299 (8th Cir. 1984); Aircraft Mechanics Local 24 v. Ozark Air Lines, Inc., 597 F.2d 1155, 1157 (8th Cir. 1979); and it is of no consequence that the court might have reached a different conclusion or a different result had it reviewed the merits

of the dispute in the first instance. Armstrong Lodge 762 v. Union Pacific Railway Company, 783 F.2d 131, 135 (8th Cir. 1986).

REASONS FOR GRANTING THE PETITION

The reasoning of the majority of the panel in rejecting the arbitrator's interpretation of the Last Chance Agreement, was that the language of the Agreement was "unambiguous and therefore not susceptible of interpretation by the arbitrator. . . ." Appendix A, Footnote 8. It is difficult to accept the proposition that the language "any such offense of a similar and/or like nature" is not susceptible of more than one interpretation. However, even if that may be so, the arbitrator's interpretation of that language is the basis for his decision, and thus his decision must be said to "draw its essence" from the Agreement. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. at 597; and the Court may not disregard that interpretation merely because it disagrees with it. Paperworkers v. Misco, 484 U.S. at 38.

As this Court observed in George A. Hormel Company v. United Food and Commercian Workers Local 9, 879 F.2d 347, 350 (8th Cir. 1989):

> This court cannot find that the arbitrator failed to construe the agreement at issue simply because we believe that the language of the agreement is plain, unambiguous and not susceptible to the particular construction given by the arbitrator. This would result in a reversal based upon our perception that the arbitrator committed serious error in his interpretation. Such a result is forbidden by Misco.

The majority of the panel has ignored this injunction and reversed the arbitrator on the basis that his interpretation of the Last Chance Agreement was erroneous because the "unambiguous" language of the Agreement required a contrary result. Appendix A, Footnote 8. That decision is clearly erroneous.

The decisions of the Supreme Court and this Court are clear on the issue; and therefore the Petition for Rehearing En Banc should be granted. Otherwise, this panel decision will make

virtually every routine arbitrator's award subject to judicial review contrary to well established precedent. Appendix A, pg. 11.

Respectfully submitted,

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Attorney for
Appellant/Petitioner

Of Counsel:

Craig & Craig, P.C.

COUNSEL'S STATEMENT PURSUANT TO RULE 35(C)(2) OF THE RULES OF APPELLATE PROCEDURE OF THE EIGHTH CIRCUIT

I express a belief based on a reasoned and studied professional judgment, that the decision is contrary to the following decisions of the Supreme Court of the United States and the United States Court of Appeals for the Eighth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

United Paperworkers International Union v. Misco, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)

George A. Hormel Company v. United Food and Commercial Workers Local 9, 879 F.2d 347 (8th Cir. 1989)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2876

Coca-Cola Bottling Company of St. Louis, Appellee, v. Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, Appellant.	)	Appeal from the United States District Court for Eastern District of Missouri

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Submitted: February 13, 1992

Filed: March 26, 1992

Before BOWMAN, WOLLMAN, Circuit Judges, and WOODS,* District Judge.

BOWMAN, Circuit Judge.

This is an appeal from the District Court's[1]

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[1]The Honorable Jean Hamilton, United States District Judge for the Eastern District of Missouri.

decision granting summary judgment in favor of the Coca-Cola Bottling Company of St. Louis (Company) and vacating a labor arbitrator's award. We affirm.

The appellant in this action, Teamsters Local Union No. 688 (Union), is the bargaining representative of Coca-Cola employee Kenneth Youngermann. Youngermann was employed as a driver under the terms of a collective bargaining agreement between the Union and the Company from 1984 until his termination on May 1, 1989. Youngermann's relationship with his employer was not without its difficulties and in fact was strained throughout much of his employment.

Company rules provide for a progressive disciplinary system, with five levels of increasingly severe punishment for successive violations of category A rules.[2] The levels of

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[2]There are also rules categories B and C for which there are fewer or no levels of progressive discipline, as violations of these rules are considered more serious. Termination is thus an option after only one or two violations of rules in categories B and C.

discipline for such violations progress from warnings through suspension to the discipline set out for the fifth (and ordinarily final) offense: "Immediate suspension, without compensation, pending investigation for termination." Arbitration Opinion and Award at 10, reprinted in Appendix at 10, 19.[3] Category A rules include A-1, each driver is responsible for keeping his assigned vehicle clean at all times; A-10, employees must punch their timecards when leaving work; and A-18, employees are required to follow designated safety procedures. Id. at 11, reprinted in Appendix at 20. It is Youngermann's alleged violations of these three rules that finally resulted in his discharge.

By August 16, 1988, Youngermann had progressed through the first four levels of discipline for category A rules violations. Between

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[3]There were provisions in the rules that aborted an employee's progression through the five levels of discipline when the last offense became stale. Thus an individual could purge his record of prior violations if a certain amount of time passed without another.

August 16 and September 6, 1988, Youngermann reached level five as a result of several rules violations, including two incidents involving customers who requested that Youngermann no longer service their accounts. On September 6, Youngermann met with two Union stewards and three Company representatives to discuss the action to be taken pursuant to level five of the disciplinary system--termination.

The denouement of that meeting was not Youngermann's termination, as clearly contemplated by the rules, but instead a "Disciplinary Action Notice." The notice set forth an agreement entered into "[p]ursuant to the Union's recommendation" that imposed upon Youngermann a ten-day suspension without compensation for violation of rule A-25 (poor work performance), and also disqualified him from working as extra relief driver. Disciplinary Action Notice of September 6, 1988, reprinted in Appendix at 8. The notice continued:

> Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work

> inefficiency, and inattention to duties to be intolerable, warranting termination of [sic] next such occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.
>
> * * * *
>
> Final Notification
>
> Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis.

Id. reprinted in Appendix at 8-9. The Union stewards and two of the Company representatives signed the notice; Youngermann, although present, refused to sign.

In December 1988, Youngermann received a forty-day suspension without pay. (The arbitrator denied Youngermann's grievance challenging this suspension.) On April 19, 1989, Youngermann and a shop steward were called to a counseling (as opposed to disciplinary) meeting with Company representatives. The counseling was not well-received by Youngermann, and one of the

Coca-Cola representatives lost his temper and suspended Youngermann for "insubordination." On April 26, a Disciplinary Action Notice was completed noting three category A rules violations: failure to complete accurately a Department of Transportation form on April 14, 1989 (rule A-18); failure to clock out on april 18, 1989 (rule A-10); and failure to maintain the interior of the assigned vehicle on April 19, 1989 (rule A-1). Youngermann was discharged on May 1, 1989.

In accordance with the terms of the collective bargaining agreement between the Union and Coca-Cola, the Union filed on Youngermann's behalf a series of eleven grievances that went to arbitration.[4] The arbitrator sustained Youngermann's grievance concerning the discharge and ordered him reinstated with back pay. Coca-Cola appealed to the District Court seeking to have the arbitration award vacated. The Dis-

[4]This appeal is limited to the award as it relates to the discharge grievances.

trict Court, in an unpublished memorandum and order, granted summary judgment to Coca-Cola and vacated the award. This appeal followed.

Because this case was decided on cross-motions for summary judgment, the parties agree there are no disputed issues of material fact. The question remains whether the District Court was correct in holding that Coca-Cola was entitled to judgment as a matter of law. We review the District Court's legal conclusions de novo.

Federal labor law is noteworthy for its strong public policy in favor of the private resolution of labor disputes without resort to the courts. See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). The courts' review of arbitration awards is exceptionally narrow. Where parties have a bargained-for agreement to resolve disputes via arbitration, courts ordinarily must defer to the resolution reached by the mutually agreed-upon arbitrator who typically has special knowledge of the arena in which the dispute

arose. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

While the scope of review of an arbitrator's award is sharply limited, there are circumstances (in addition to fraud or the arbitrator's dishonesty, see id.) where a court may reverse an arbitration decision. "The arbitrator may not ignore the plain language of the contract . . . ." Id. "[H]e does not sit to dispense his own brand of industrial justice." Enterprise Wheel, 363 U.S. at 597. The "award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Id. We agree with the District Court that here the arbitrator went beyond the essence of the applicable agreement in crafting this award.

The basis for our decision is the agreement executed by the Union stewards and the Company representatives at the time Youngermann reached the fifth and final level of discipline. At this level he was subject to discharge, and the agreement, while giving him another opportunity to correct the deficiencies in his job performance, provided for his discharge in the event he did not.[5] This agreement clearly was a "last chance" agreement, that is, a "contract[] between [employer] and employee to suspend disciplinary action pending a probationary period in which the employee is afforded a chance to improve his or her performance." United States Dep't of the Air Force v. Federal Labor Rela-

[5]Although Youngermann refused to sign the agreement, the validity or binding force of the agreement upon Youngermann, acknowledged by the arbitrator, see Arbitration Opinion and Award at 43, reprinted in Appendix at 10, 52, is not an issue in this appeal.

tions Auth., 949 F.2d 475, 477 (D.C. Cir. 1991). "If the employee fails to measure up as promised in a last chance agreement, the [employer] may proceed to administer the discipline earlier suspended," id. at 478, without reference to the collective bargaining agreement. Here, Coca-Cola, finding rules violations by Youngermann subsequent to the date of the last chance agreement, proceeded to terminate Youngermann.

Although the arbitrator's opinion discusses at some length the topic of just cause to terminate under the collective bargaining agreement, see Arbitration Opinion and Award at 39-42, reprinted in Appendix at 48-51, "just cause" under the terms of the collective bargaining agreement was irrelevant to Youngermann's discharge pursuant to the last chance agreement and should not have been considered. The last chance agreement superseded the collective

bargaining agreement.[6] See Ohio Edison Co. v. Ohio Edison Joint Council, 947 F.2d 786, 787 (6th Cir. 1991) ("normally last chance agreements are binding in arbitration"); Tootsie Roll Indus. v. Local Union No. 1, Bakery Workers' Int'l Union, 832 F.2d 81, 84 (7th Cir. 1987) (arbitrator's award was properly denied enforcement where he "based his award on a policy outside the letter agreement"); Bakers Union Factory, # 326 v. ITT Continental Baking Co., 749 F.2d 350, 354 (6th Cir. 1984) ("When a party claims that the chosen means of dispute resolution is private settlement, we have no reason to defer to the arbitrator's decision."). Thus the

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[6]Youngermann's discharge letter from the Company does reference the collective bargaining agreement, stating that the termination is "in accordance with" Article 43 of the collective bargaining agreement. Arbitration Opinion and Award at 35, reprinted in Appendix at 10, 44. Article 43 lays out the progressive discipline scheme. Collective Bargaining Agreement at 46-47, reprinted in Appendix at 124, 172-173. Article 13 of the agreement discusses discharge for just cause. Id. at 12, reprinted in Appendix at 138. It is not mentioned in the discharge letter.

bargained-for last chance agreement controls our review of the arbitrator's award, which we cannot sustain if we are persuaded the arbitrator went outside that agreement in constructing the award.

Indisputably, there are arbitrable issues here: whether the alleged triggering event, as defined by the agreement, actually occurred and whether, according to the agreement, that event really was a triggering event--an "offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations." Disciplinary Action Notice of September 6, 1988, reprinted in Appendix at 8, 9. The arbitrator's "determinations [on these issues] retain the benefit of a deferential standard of review." Bakers Union, 749 F.2d at 356. The arbitrator correctly noted that he also had authority, upon finding a rules violation had occurred, to determine "proportionality of discharge unless the contract mandates an exclusive remedy."

Arbitration Opinion and Award at 40, reprinted in Appendix at 10, 49 (emphasis added). Here, of course, the last chance agreement did set out an exclusive remedy upon the next violation--termination. Having reviewed the arbitration opinion, we hold that the arbitrator went outside the last chance agreement by rejecting the bargained-for remedy, notwithstanding his determination that a category A rules violation, a triggering event, had occurred.

The arbitrator determined that Youngermann's error on the Department of Transportation form was an inadvertent transposition of numbers within the vehicle identification number required on the form. While in fact the error did occur, the arbitrator found "no infraction of rule A-18 with respect to the DOT form." Id. at 49, reprinted in Appendix at 58. As for the violation of rule A-1, concerning the condition of Youngermann's truck, the arbitrator found "that the Company failed to prove that the Grievant violated rule A-1." Id. at 49-50,

reprinted in Appendix at 58-59. These determinations, going as they do to what the parties agree are arbitrable issues, we review under the highly deferential standard ordinarily applicable to arbitration awards. While we may not agree with the arbitrator's findings on these issues, we "may not reject those findings simply because [we] disagree [] with them." Misco, 484 U.S. at 38.

On Youngermann's third alleged violation the arbitrator found that "[f]ailure to clock out is a violation of rule A-10." Arbitration Opinion and Award at 50, reprinted in Appendix at 10, 59. He also found that Youngermann in fact had failed to clock out. But because Youngermann himself had told management of the violation, because Youngermann "did not intend to gain anything by failing to clock out," and because there is no record of management reacting to the violation when first advised of it,

the arbitrator declared it "de minimis." Id.[7]

Although he found that Youngermann had violated the rules, the arbitrator nevertheless reversed the discharge in contravention of the plain language of the last chance agreement.[8] The arbitrator attempted to disguise his venturing outside the agreement by finding "as a fact that the three alleged infractions represented - cumulatively - the triggering event for discharge in this arbitration." Id. at 49, re

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[7]Evidently this finding of degree had no bearing on the arbitrator's final decision, as indeed it could not. The arbitrator's authority was to determine whether or not Youngermann had violated a category A rule. The relative seriousness of the violation was not an issue under the terms of the last chance agreement.

[8]We believe that it is unambiguous, and therefore not susceptible of interpretation by the arbitrator, that the phrase "offense of a similar and/or like nature" warrants comparison with offenses that are violations of "Category A Rules and Regulations," the passage that follows the comparative language in the last chance agreement, as opposed to comparison with some other offense undefined by the agreement. In any event, as discussed in the text of this opinion, it is apparent that the arbitrator did not base his decision on a conclusion that the rules violation he found to have occurred was not of "a similar and/or like nature" in comparison with some other violation.

printed in Appendix at 58 (emphasis added). He reached this conclusion because there was "no support for the proposition, which in fact was not explicitly made, that the Grievant would have been discharged for any one of the alleged infractions had it been the only infraction." Id. Because only one violation had occurred (and a purportedly "de minimis" one at that), he reasoned, "there was no factual or contractual basis for any discipline." Id. at 50, reprinted in Appendix at 59.

If this were in reality a factual finding by the arbitrator, we would be obliged to give it the highest deference. See Franklin Elec. Co. v. International Union, UAW, 886 F.2d 188, 192 (8th Cir. 1989). But labeling this a finding of fact does not make it so. The arbitrator found a rules violation, and termination was the bargained-for result. The language of the last chance agreement upon this issue is unambiguous; it says nothing about multiple violations being required to activate the remedy therein. The

arbitrator did not have authority to alter the agreement by interpreting unambiguous language in a way contrary to its plain meaning, while attempting to characterize his actions outside of his authority as fact-finding. See Northwest Airlines v. International Ass'n of Machinists Workers, Air Transport Dist. Lodge # 143, 894 F.2d 998, 1000 (8th Cir. 1990). "[T]he language of the agreement is clear and unambiguous, and since the parties agreed to it, they are bound by it." Tootsie Roll, 832 F.2d at 84; cf. Franklin Elec. Co., 886 F.2d at 193 ("Unlike the facts of Tootsie Roll Industries, where there was a special letter agreement dealing specifically and unambiguously with one situation, here the terms of the CBA are not entirely unambiguous as they are intended to deal with all situations that arise during the employment relationship including layoffs.").

The arbitrator's disregard of the language of the last chance agreement concerning the consequences to Youngermann of a finding that he

had committed a category A rules violation requires the reversal of his award. See George A. Hormel & Co. v. United Food Workers, Local 9, 879 F.2d 347, 351 (8th Cir. 1989) ("We believe that where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract.").

The judgment of the District Court is affirmed.

WOODS, District Judge, dissenting.

I must be respectfully dissent. The majority correctly states that the Last Chance Agreement (LCA) superseded the Collective Bargaining Agreement. The majority also correctly states that appellate review of an award emanating from binding arbitration is extremely limited and must be affirmed so long as it draws its essence from the contract (in this case, the LCA).

To affirm the district court's decision to reverse the arbitrator's award, the majority relied on its interpretation of the LCA. The majority says, by way of a footnote, "We <u>believe</u> that [the Last Chance Agreement] is unambiguous, and therefore not susceptible of interpretation by the arbitrator, that the phrase 'offense of a similar and/or like nature' <u>warrants comparison</u> with offenses that are violations of 'Category A. Rules and Regulations.'" Page 8, n.8 (emphasis added).

The fact is that the Last Chance Agreement, drafted by the employer, did not say the appellant would be discharged for a Class A rule violation. The Last Chance Agreement said the appellant would be discharged for an "offense of a similar and/or like nature." (The appellant's previous offense involved offensive and rude behavior toward customers.) The majority would have interpreted "offenses of a similar and/or like nature" to mean Category A offenses, but it is not this Court's duty to decide whether "like

or similar" conduct "warrants comparison" with Category A offenses. This Court's review is limited to determining whether the arbitrator's decision ignored the LCA and, in effect, made an award in contravention of it.

The arbitrator's interpretation of the LCA in this case was reasonable. If the employer had intended the LCA to mean that the appellant would be dismissed for any Category A offense, however de minimis, then it should have said so. By defining "dischargeable offense" as one of a "similar and/or like nature," the parties invited -- and required -- the Arbitrator to interpret that phrase. An arbitrator's interpretation of the parties' agreement in the context of binding arbitration is entitled to the greatest deference in all American jurisprudence. Furthermore, under the majority's decision the "similar and/or like" clause would have been superfluous, meaningless language.

Perhaps the most troubling repercussion of the majority's decision is that it opens the

floodgates for appellate review of every routine arbitrator's award and effectively negates the "binding" aspect of binding arbitration. For these reasons, I respectfully dissent from the majority decision.

A true copy.

Attest:

CLERK, U.S., COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-2876EMSL

Coca-Cola Bottling of St. Louis,	*	
Appellee,	*	Appeal from the United States
v.	*	District Court for
Teamsters Local Union No. 688, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO,	*	the Eastern District of Missouri
Appellant.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 26, 1992

A true copy.

Attest: /s/ Michael E. Gans

Clerk, U.S. Court of Appeals,
Eighth Circuit

MANDATE ISSUED 5/18/92

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2876EMSL

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 688, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Appellant.

On Appeal from
The United States District Court
For The Eastern District Of Missouri
Honorable Jean Hamilton, Presiding

Brief of Appellant

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case was filed by Plaintiff-Appellee to vacate an arbitrator's award pursuant to a collective bargaining agreement ordering that a discharged employee be reinstated and made whole. Defendant-Appellant filed a counterclaim for enforcement of the arbitrator's award. The case was submitted to the District Court on cross motions for summary judgment. The District Court, Hon. Jean Hamilton presiding, vacated the award on the basis that the arbitrator incorrectly interpreted the agreement. Appellant requests twenty minutes for oral argument because the case presents substantial factual and legal issues for the Court's review.

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Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185. 1

I. PRELIMINARY STATEMENT

This appeal is from the unreported decision of Hon. Jean Hamilton, United States District Court for the Eastern District of Missouri, issued on June 28, 1991 vacating an arbitrator's award pursuant to a collective bargaining agreement ordering that a discharged employee be reinstated and made whole. Add.[1] Jurisdiction of the District Court was invoked pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, 28 U.S.C. §§ 1331 and 1337, and 9 U.S.C. § 10. This Court's jurisdiction is predicated on 28 U.S.C. § 1291.

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[1]"Add." herein refers to the District Court's Memorandum and Order attached as an addendum to this Brief.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the District Court err in vacating an arbitrator's award pursuant to a collective bargaining agreement by deciding the merits of the grievance?

United Steelworkers of America v. America Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960)

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)

Paperworkers v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987

Daniel Construction Company v. Operating Engineers Local 513, 783 F.2d 296 (8th Cir. 1984)

III. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case was filed by Plaintiff-Appellee on December 14, 1990 to vacate an arbitrator's award pursuant to a collective bargaining agreement ordering that a discharged employee be reinstated and made whole. Defendant-Appellant filed a counterclaim for enforcement of the award. App. 2.[2] The case was submitted to the District Court on cross motions for summary judgment. On June 28, 1991, the District Court issued a Memorandum and Order vacating the award on the basis that the arbitrator had incorrectly interpreted the agreement. Add. Appellant's notice of appeal was filed out of time by leave of the District Court on July 31, 1991. App. 3.

B. Statement of Facts

Appellant Teamsters Local Union No. 688 (hereafter referred to as "the Union") was the

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[2]"App." herein refers to the Appendix filed pursuant to the Federal Rules of Appellate Procedure.

collective bargaining representative of the drivers employed by Appellee Coca-Cola Bottling Company of St. Louis, Inc. (hereafter referred to as "the Employer") in the St. Louis metropolitan area. App. 127. The Employer and the Union were parties to a collective bargaining agreement which contained a mandatory grievance procedure culminating in final and binding arbitration. App. 134-136.

The dispute involves a series of grievances filed by Kenneth Youngermann, a driver employed by the Employer under the terms of the collective bargaining agreement. App. 10. The grievances were filed in some instances in response to discipline imposed on Youngermann by the Employer, including his termination on May 1, 1989. App. 10-11.

The parties submitted ten (10) disputes arising out of these grievances to arbitration pursuant to the terms of the collective bargain ing agreement. App. 10. Extensive evidentiary

hearings were held, Id.; and on September 17, 1990 the arbitrator issued his Opinion and Award denying the grievances in four (4) of the disputes, denying the grievance in part in one (1) of the disputes, sustaining the grievances in five (5) of the disputes, and ordering that Youngermann be reinstated and made whole. App. 60.

The crux of this appeal has to do with the last two disputes (Arbitrations Nos. 10 and 11) dealing with Youngermann's discharge which the arbitrator found to be improper. The essential facts leading up to the discharge may be briefly summarized.

Youngermann, as the arbitrator found, was not a model employee, App. 47-48; and the Employer had included him on a "hit list" consisting of four (4) employees targeted for discharge. App. 13. On September 6, 1988 representatives of the Employer and the Union (including Youngermann) met to discuss what disci-

plinary penalty (if any) should be imposed on Youngermann for alleged violation of a work rule. At that time Youngermann was employed as an "Extra Relief Driver" with no regularly assigned route. The Employer drafted a document entitled Disciplinary Action Notice which reads as follows:

> Pursuant to the Union's recommendation on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.
>
> Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness,

inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. App. 8-9, 21-22.

The document was signed by two supervisors and two stewards,[3] but Youngermann refused to sign it. App. 8, 22. Shortly thereafter, on December 9, 1988, Youngermann was given a forty day disciplinary suspension for poor work perform-

[3]Although the stewards asserted that they signed merely t knowledge receipt and not to indicate agreement. App. 31.

BEST AVAILABLE COPY

ance in violation of Company Rule A-25 which the arbitrator upheld as justified. App. 53-54.

The facts relating to Youngermann's discharge began on April 19, 1989. At that time, two supervisors (Roustio and Ryan) had an "instructional" or "counseling" (as opposed to disciplinary) meeting with Youngermann about work-related matters in the presence of a steward. App. 39. The discussion initially covered several subjects, but eventually became focused on the right of Youngermann to physically count his coins when accounting for cash at the end of the day rather than relying on the Employer's change counters. App. 40. One of the supervisors (Roustio) lost his temper, pounded his desk and suspended Youngermann. When Youngermann asked why he was suspended, Roustio responded, "We start with insubordination." App. 40-41. Roustio later candidly admitted that he did not have just cause for the suspension. App. 41.

Immediately following this meeting, three

prior unrelated events surfaced: Youngermann's inadvertent failure to clock out on April 14, 1989, App. 39, 56-57; trash or debris which had been left in the truck Youngermann had driven on that day, App. 39; and an inadvertent transposition of truck numbers on a DOT form. Id. These three "infractions" were not brought forward by Ryan until after the April 19 meeting, and were not discussed at the meeting, App. 56-57; and the Employer relied on them cumulatively to justify its termination of Youngermann on May 1, 1989. App. 58. The arbitrator found that the reasons which the Employer relied on to justify the discharge were "contrived", App. 57; that the debris left in the truck and transposition of numbers on the DOT form did not constitute violations of Category A rules, App. 58-59; and the inadvertent failure to clock out was a de minimis violation. App. 59. On this basis, the arbitrator invalidated the discharge, and ordered that Youngermann be reinstated and made whole. Id. The District Court vacated the

arbitrator's award on the basis that the de minimis violation was adequate basis for the discharge under the September 6 agreement. Add. 5. This appeal followed in due course.

IV. SUMMARY OF ARGUMENT

The evidence clearly reveals that the District Court exceeded the scope of its review of the arbitrator's award in contravention of established precedent of this Court and the United States Supreme Court by redeciding the merits of the dispute rather than deferring to the arbitrator freely selected by the parties. This unwarranted intrusion into the arbitral process by substituting the Court's judgment for the arbitrator's on the issues properly before him impermissibly undermines the process, and the District Court's judgment should be reversed because the arbitrator's award draws its essence from the collective bargaining agreement.

V. ARGUMENT

A. Preliminary Remarks: The Law of the Case

There is a strong federal policy favoring

arbitration of labor disputes. Section 203(d), Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 173(d); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 566, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). Thus, the standard of review of an arbitrator's award is deferential: an award is entitled to enforcement so long as it "draws its essence" from the collective bargaining agreement. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); Franklin Electric Co. v. UAW Local 1000, 886 F.2d 188, 192 (8th Cir. 1989). And an award "draws its essence" from the agreement unless it may be said with positive assurance that the contract is not susceptible of the interpretation given to it by the arbitrator, George A. Hormel Company v. United Food & Commercial Workers Local 9, 879 F.2d 347, 350 (8th Cir. 1989); and this applies equally to arbitrators' decisions con-

cerning just cause for discharge of an employee. Vulcan-Hart Corporation v. Stove Workers Local 110, 671 F.2d 1182, 1185 (8th Cir. 1982).

This is because it is the arbitrator's decision which was bargained for, and it is the arbitrator's decision which must be enforced. Enterprise Wheel and Car Corp., 363 U.S. at 599.

> "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual and legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract: but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the gound that the arbitrator misread the contract." United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

Consistent with these principles, an agreement

must be broadly construed and all doubts resolved in favor of the validity of the award. Walsh v. Union Pacific Railroad Company, 803 F.2d 412, 414 (8th Cir. 1986).

A labor agreement is unlike commercial contracts and "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). Further, the "labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." Ibid. at 581, 1352.

Thus, courts have no business weighing the merits of a dispute, or attempting to determine whether the arbitrator resolved it correctly, American Manufacturing Co., 363 U.S. at 568; Enterprise Wheel and Car Corp., 363 U.S. at 596; Daniel Construction Company v. Operating Engi-

neers Local 513, 738 F.2d 296, 299 (8th Cir. 1984); Aircraft Mechanics Local 24 v. Ozark Air Lines, Inc., 597 F.2d 1155, 1157 (8th Cir. 1979); and it is of no consequence that the court might have reached a different conclusion or a different result had it reviewed the merits of the dispute in the first instance. Armstrong Lodge 762 v. Union Pacific Railway Company, 783 F.2d 131, 135 (8th Cir. 1986).

In the light of these firmly established principles, it is clear that the District Court impermissibly intruded into the arbitral process by deciding the grievance on the merits rather than deferring to the arbitrator whose judgment was bargained for.

B. The September 6 Agreement

The contract clearly provides for a "just cause" standard for discharge. App. 138. The Employer argued that the September 6, 1988 agreement, sometimes referred to as the Last Chance Agreement (LCA), abrogated that just cause standard, and permitted discharge for any

offense, no matter how insubstantial. The arbitrator did not read the agreement so restrictively. The District Court, however, in spite of the deference courts are required to give arbitrators' decisions, did read the agreement very restrictively; and on that basis the District Court vacated the arbitrator's award. Add. 6. An examination of the terms of the agreement and the circumstances which gave rise to it reveal that the District Court's reading is too restrictive, and the arbitrator's judgment is entitled to deference in this case.

The September 6 agreement arose in the context of the Employer's receipt of customer complaints about Youngermann's attitude and conduct. App.28-33. In lieu of discharge, the Employer imposed a ten day suspension and disqualified Youngermann as an Extra Relief Driver. App. 31. The Union stewards signed the agreement, although they asserted that their signatures were merely to acknowledge receipt rather than agreement, App. 31; but Youngermann refused

to sign it and promptly grieved the suspension. App. 8, 22, 132-33. The last paragraph of the agreement was headed "Final Notification" and contained the following language:

> Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis.
> App. 9, 22.
> (emphasis supplied).

This is hardly a typical last chance agreement which authorized discharge upon the occurrence of any subsequent offense; but is a limited agreement which authorized discharge upon the occurrence of "such" offense of a "similar and/or like nature." Id. It was the essential function of the arbitrator, and not the court, to determine whether the subsequent "offenses" which the Employer relied on in discharging Youngermann were "such offense of a similar and/or like nature". Paperworkers v. Misco, supra 484 U.S. at 37-38.

Furthermore, a last chance agreement generally contemplates that the employee accept the

conditions in order to avoid termination; but Youngermann not only did not accept or sign the September 6 agreement, but he promptly grieved it and pursued the grievances through the Union. App. 8, 22, 32-33.

Finally, and perhaps most telling of all, the Employer itself did not apply the "last chance" provisions of the September 6 agreement when it imposed a forty day suspension on Youngermann for poor work performance[4] on December 9, 1988, just two months later. App. 34. Obviously, the Employer did not view the September 6 agreement as a complete abrogation of the just cause standard of the contract which permitted it to discharge Youngermann at will.

It is important to note the arbitrator's finding with respect to final notification language of the September 6 agreement. He correctly observed that last chance agreements

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[4]Indisputably a "Category A" violation of a "similar and/or like nature."

"are regularly signed by the parties involved - the company, the union and the individual."[5] App. 51. Also, he noted that "for such waivers to be effective, the Company must prove the validity of the agreement", and "the following conditions must be met: (1) the waiver must be specific, (2) the employee must have full knowledge as to the rights he is giving up, (3) the employee must receive a substantial benefit in return, and (4) the Union must participate and consent."[6] App. 52. But the bottom line is that the arbitrator found that "it is not necessary to discuss the post-September 6 rights and obligations of the Parties and the Grievant under the September 6 document" because "what that document says with respect to this Grievant's situation is nothing else than a restatement of a right the Company has had under the Agreement and the progressive discipline

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[5]Quoting from BASF Corporation, 90 LA 460, 462 (Daniel 1987)

[6]Quoting from Atlantic Richfield Co., 81 LA 1193, 1195-1196 (Heinsz 1983)

scheme." Id. This most certainly is a finding which "draws its essence" from the collective bargaining agreement. Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. at 597; and thus a finding which the District Court was obliged to accept. Nevertheless, the arbitrator accepted "the consensual nature" of the September 6 agreement, App. 52; and he applied it according to his interpretation of its terms. The District Court rejected that interpretation and imposed its own contrary interpretation. This was an unwarranted intrusion into the arbitral process whereby the District Court impermissibly decided the merits of the grievance. Steelworkers v. American Manufacturing Co., supra, 363 U.S. at 568.

The District Court had the fixed view that "[l]ast chance agreements can and do supersede the just cause provisions of a collective bargaining agreement." Add. pg. 4. That is far too rigid a view.

The District Court cited two arbitration

decisions in support of its view of the September 6 agreement. Sorg Paper Company, 89 LA 1237 (Dworkin 1987) and Inland Container Corporation, 91 LA 544 (Howell 1988). In Sorg Paper Company, the terms of the last chance agreement which the employee agreed to were very strict,[7] and the arbitrator recognized that "proper cause, like any benefit of employment can be reduced or eliminated through voluntary bargaining." Ibid. at 1241. But that same arbitrator in a later case (Ohio Department of Highway Safety, 96 LA 73 (Dworkin 1990)) observed that "before enforcing a last-chance agreement, an arbitrator should scrutinize it to determine what aspects of just cause were retained." Ibid. at 77. That is precisely what the arbitrator in this case did, and the District Court improperly rejected that analysis. Further, Arbitrator

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[7]"If [Grievant] appears before the [Discipline Control] Board again while on probation, it will result in automatic discharge. . . ." Ibid. at 1238.

Dworkin also noted in Ohio Department of Highway Safety that "an arbitrator is not bound by portions of a last-chance agreement which are overtly irrational or destroy more employment entitlements than appropriate to accomplish a reasonable goal." Id. In Inland Container the arbitrator merely enforced a last chance agreement when the subsequent violation clearly fell within the terms of the agreement.[8]

Thus, last chance agreements are interpreted by arbitrators according to their terms and the circumstances which gave rise to them; and they are not automatically enforced in all cases. Freuhauf Corporation, 88 LA 366 (Nathan 1986).[9] This is particularly true where the

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[8]Employee discharged for absenteeism was reinstated under last chance agreement which provided: "This decision is made with the understanding that any repetition of the conduct that gave rise to this action will be considered as cause for immediate termination." Subsequent unexcused absences resulted in his termination. Ibid. at 545-546.

[9]Employee who was on drug rehabilitation last chance agreement was improperly discharged for refusing to take a drug screening test on returning to work after a brief absence because of a work related injury.

employee did not "sign-off" on the last chance agreement. Food Marketing Corporation, 88 LA 98, 102-104 (Doering 1986).

The District Court also relied on Tootsie Roll Industries, Inc. v. Bakery Workers Local 1, 832 F.2d 81 (7th Cir. 1987), in support of its decision. The employee in that case was discharged for excessive absenteeism, and the last chance agreement provided that the employee's "reinstatement shall be on a 'last chance' basis whereunder she will be required to maintain an acceptable attandance [sic] level and will be terminated in the event she is absent, for any reason whatsoever including illness, more than one day per month for the first six months following her reinstatement." Ibid. at 82. Thereafter, she was absent on four occasions within the six month period, and was terminated. The arbitrator found that the discharge was unjustified because some of the absences were justified under the circumstances, and the Court vacated the award because the arbitrator ig-

nored, rather than interpreted, the clear terms of the last chance agreement. Ibid. at 82-83. Tootsie Roll is not analgous because the arbitrator in this case did have language before him which required interpretation in light of the circumstances which gave rise to the September 6 agreement: i.e., whether the subsequent offenses were "of a similar and/or like nature." That was an interpretation which was exclusively within the province of the arbitrator, and not the court. Paperworkers v. Misco, Inc., supra, 484 U.S. at 37-38.

C. The Discharge: Triggering Event

It was the arbitrator's view that the final notification clause of the September 6 agreement "is nothing else than a restatement of a right the Company has had under the Agreement and the progressive discipline scheme." App. 52. This certainly is a permissible reading of the contract because Youngermann was, at the time that the September 6 agreement was drafted, at the 5th offense level of Category A Rules viola-

tions, and therefore subject to termination at that time or upon a subsequent substantial violation. App. 18-19. But whether the discharge is predicated on the contract or the September 6 agreement or, perhaps, a combination of both, there must be evidence of a subsequent offense "of a similar and/or like nature" to justify the discharge. This is what the arbitrator described as a "triggering event":

> "Under an employment agreement which has a discharge for cause provision (as opposed to at-will relationship), be it a basic labor agreement or a last chance agreement, an employee may be discharged only for an act or ommission which is often referred to as the triggering event, and which is prohibited. Labor arbitrators must engage in a three step analysis. The first step is represented by the question whether the triggering event occurred. If the answer is in the affirmative the next question is whether the triggering event represents an infraction under the agreement, whether there is a defense, etc. The third step is the determination of proportionality of discharge unless the contract mandates an exclusive remedy." App. 48-49.

Analyzing the facts of the case to determine whether there was a triggering event, the arbitrator found from the evidence that the three

"offenses" which the Employer relied on to support the discharge were brought forward after the April 19, 1989 meeting where Youngermann was improperly suspended by supervisor Roustio in a fit of anger, App. 56-57; that the three reasons were "contrived" reasons and that the Employer "was not interested in what happened"; but was "only interested in discharging the Grievant", App. 57; that the three infractions were relied on "cumulatively" and not separately to justify the discharge, App. 58; and that two of the infractions (transposition of truck numbers on a DOT form and trash in the truck) were not violations of Category A Rules, App. 58-59; and the third infraction (failure to clock out) was a de minimis violation which standing alone did not justify the discharge. App. 59.

The District Court rejected the arbitrator's analysis out of hand without addressing the step-by-step analysis made by the arbitrator, and held that "Grievant's failure to clock out, de minimus [sic] or not, fulfills the 'any

violation' criteria that would warrant termination." Add. 5. Of course, this finding fails to take into consideration all of the relevant language of the September 6 agreement: "Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis." App. 9, 22. And, of course, in making this finding, the District Court was deciding the merits of the grievances in violation of the principle of judicial deference to arbitrators' decisions. Steelworkers v. Enterprise Wheel and Car Corp., supra, 363 U.S. at 597; Paperworkers v. Misco, Inc., supra, 484 U.S. at 37-38. This the District Court may not be permitted to do.

VI. CONCLUSION

The arbitrator brought his informed judgment to bear on the issues before him, and his findings and conclusions were evidentiary-based, and, at least arguably, proper interpretations of the basic labor agreement and the September 6

agreement. The District Court in vacating the award impermissibly redecided the merits of the grievance, and improperly imposed her own views of the contract. Therefore, the judgment should be reversed, and an order entered enforcing the arbitrator's award.

Respectfully submitted,

/s/ Clyde E. Craig/RKS

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Attorney for Appellee

Of Counsel:

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CERTIFICATE OF SERVICE

Two copies of the Brief of Appellant were mailed by ordinary mail on this 24th day of October, 1991 to each of the following attorneys of record for Appellee:

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Attorneys for the
Appellee

Addendum

District Court's Memorandum and Order and Judgement - June 28, 1991

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

COCA-COLA BOTTLING COMPANY OF ST. LOUIS,	)	
Plaintiff,	)	
v.	)	Cause No. 90-2344C(7)
TEAMSTERS LOCAL UNION NO. 688, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court upon Defendant's Motion for Summary Judgment on Counterclaim and Plaintiff's Motion for Summary Judgment. Each party contends that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(C).

I

Grievant Kenneth Youngermann was employed by Plaintiff Coca-Cola Bottling Co. of St. Louis

("St. Louis Coke") in 1984, and the terms of employment were governed by a collective bargaining agreement ("CBA") between St. Louis Coke and Defendant Teamsters Local Union No. 688 ("Union"). The CBA required a showing of "just cause" grounds for termination of an employee. The working relationship between Grievant and St. Louis Coke deteriorated, and all parties agreed in September, 1988 to a Last-Chance Agreement ("LCA") by which Grievant could be terminated upon any showing of violative conduct. Citing three alleged violation, St. Louis Coke terminated Grievant on May 1, 1989. The parties submitted the dispute to arbitration. In September, 1990, the arbitrator found in favor of Grievant on some of the issues. St. Louis Coke conditionally reinstated Grievant in December, 1990, and shortly thereafter filed the action herein to set aside the arbitrator's award. St. Louis Coke contends that the arbitrator's decision incorrectly "drew its essence" from the CBA and its requirements of a "showing

of just cause," rather than using the "any violative conduct" standard as set forth in the superseding LCA.

II

This Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary Judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

A moving party always bears the burden of

informing the Court of the basis of its motion. Celotex Corp., 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. Id. at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. Id. at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. Id. at 249.

III

Because there is a strong federal policy favoring arbitration of labor disputes, judicial review of arbitration awards is limited. Nolde Brothers, Inc. v. Local 358, Bakery & Confec-

tionery Union Workers, 430 U.S. 243, 253-54, reh'g denied, 430 U.S. 243 (1977); Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcher Workmen, 627 F.2d 853, 856 (8th Cir. 1980). Courts may not weigh the merits of a dispute or determine whether the arbitrator resolved it correctly. United Steelworkers of America v. American System, Inc. v. Subsurfco, Inc., 914 F.2d 1072, 1075 (8th Cir. 1990). The role of the Court is merely to decide whether the arbitrator's award "drew its essence" from the collective bargaining agreement. Franklin Elec. Co. v. UAW Local 1000, 886 F.2d 188, 192 (8th Cir. 1989). The award should not be overturned as long as it has a rational basis rooted in the contract, even though the Court may have decided differently had it considered the matter initially. Nolde Brothers, Inc., 430 U.S. at 253-54; Armstrong Lodge No. 762 v. Union Pac. R. Co., 783 F.2d 131, 135 (8th Cir. 1986). An award should be enforced unless the contract is not susceptible to the arbitrator's interpreta-

tion and there are additional facts which exist that strongly indicate that the arbitrator did not premise his award on the contract. George A. Hormel & Co. v. United Food & Commercial Workers Local 9, 879 F.2d 347, 350 (8th Cir. 1989).

Further, where the contract unambiguously states a penalty for particular misconduct, an arbitrator may not fashion his own remedy if he finds that the misconduct occurred. Northwest Airlines, Inc. v. International Ass'n. of Machinists and Aerospace Workers, 894 F.2d 998, 1000 (8th Cir. 1990). The arbitrator may not ignore the plain language of the contract. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); Northwest Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, Air Transport Dist. Lodge No. 143, 894 F.2d 998, 1000 (8th Cir. 1990).

Last chance agreements can and do supersede the just cause provisions of a collective bargaining agreement. Tootsie Roll Indus., Inc. v.

Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union, 832 F.2d 81 (7th Cir. 1987); Bakers Union Factory, #326 v. ITT Continental Baking Co., 749 F.2d 350 (6th Cir. 1984) (holding that "parties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction"); United Steelworkers of America v. Lukens Steel Co., No. 90-6052, 1991 WL 91559 (E.D. Pa. 1991). See also, Sorg Paper Co., 89 LA 1237, 1241-42 (Dworkin 1987); Inland Container Corp., 91 LA 544, 549 (Howell 1988). The arbitrator infers that the September 6, 1988 Disciplinary Action Notice was, in effect, the LCA, which superseded the CBA. Arbitrator's Award at p. 43. However, the arbitrator then noted that

> The [LCA] states that "any such offense of a similar and/or like nature in violations of Category A Rules and Regulations will warrant your termination of employment . . ." [Arbitrator's emphasis]. Thus, what the document says with respect to this Grievant's situation is nothing else than a

> restatement of a right the Company has had under the [CBA] and the progressive discipline scheme.

Id. The arbitrator's conclusion that the LCA is merely a "restatement" of the Grievant's rights under the CBA is unwarranted in light of the plain meaning of the LCA, essentially reduced to "any such offense . . . will warrant your termination."

The arbitrator's award stated:

> The arbitrator finds no infraction of Rule A-18 with respect to the DOT form . . . . The arbitrator finds that the Company failed to prove that the Grievant violated [R]ule A-1 [trash left in the cab of Grievant's truck] . . . [T]he arbitrator considers the violation of rule A-10 [failure to clock out] here in question to be a de minimus violation.

Arbitration Award at 49-50. Grievant's failure to clock out, de minimus or not, fulfills the "any violation" criteria that would warrant termination. In attempting to render a compromise, however, the arbitrator erred in not applying the plain language of the LCA to his findings. If the parties had intended the general termination policy of the CBA to apply,

it would have been pointless to draft the specific termination provisions of the LCA. The terms of the LCA are an unambiguous modification of the general policy, and the arbitrator erred in not following them. This Court therefore adopts the reasoning in Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union, 832 F.2d 81, (7th Cir. 1987). In Tootsie roll Indus. the arbitrator applied the more lenient absenteeism policy of the general contract rather than the policy in the last chance agreement. The court held that this application of the general policy did not draw its essence from the agreement. Id. at 83. The last chance agreement in Tootsie Roll Indus. stated that the employee would be discharged if absent for any reason. The Court found the language unambiguous and a deliberate modification of the general policy. The parties agreed to the modification and are bound by it. Id. at 84. The arbitration award should be vacated.

ACCORDINGLY,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment in Counterclaim is **DENIED.**

Dated this 28th day of June, 1991.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, Plaintiff, v. TEAMSTERS LOCAL UNION NO. 688, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, Defendant.	)	Cause No. 90-2344-C-7

JUDGMENT

In accordance with the memorandum filed with this judgment, and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff, Coca-Cola Bottling Company of St. Louis, shall have judgment against Defendant.

Dated this 28th day of June, 1991.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

COCA-COLA BOTTLING COMPANY OF ST. LOUIS,	)	
Plaintiff,	)	
v.	)	Cause No. 90-2344-C(7)
TEAMSTERS LOCAL UNION NO. 688, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM

Comes now Defendant, by attorney, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court for an Order granting summary judgment in its favor on Defendant's Counterclaim. As grounds for said motion, Defendant states:

1. Plaintiff and Defendant negotiated and executed a valid collective bargaining agreement containing a mandatory grievance procedure culminating in final and binding arbitration.

2. A number of disputes arose under the collective bargaining agreement between May 15, 1988 and May 1, 1989 relating, directly or indirectly, to an employee named Kenneth Youngermann, and the termination of his employment and the parties agreed to submit the merits of those disputes to arbitration in accordance with the terms of the collective bargaining agreement.

3. The parties selected Hon. Josef Rohlik as the arbitrator to hear and determine these disputes; and hearings were conducted by the Arbitrator on October 4, 5 and 6, 1989, January 30 and 31, 1990 and February 1 and 2, 1990, at which time all parties were afforded full opportunity to present evidence and examine and cross-examine witnesses. Neither party raised any question of substantive or procedural arbitrability; and the merits of the disputes were properly submitted to the Arbitrator for determination.

4. On September 17, 1990 the Arbitrator

issued his Decision and Award finding for Plaintiff on some issues and for Defendant on other issues, and ordering that Kenneth Youngermann be reinstated and made whole for any loss of earnings as a result of his discharge. Plaintiff has reinstated Youngermann conditionally, but has failed to make him whole or comply with other aspects of the Arbitrator's Decision and Award.

5. The Arbitrator's Decision and Award drew its essence from the collective bargaining agreement.

6. There is no dispute as to any material fact, and Defendant is entitled to judgment as a matter of law.

WHEREFORE, Defendant prays the Court for Summary Judgment against Plaintiff on Defendant's counterclaim, for its costs expended herein, including reasonable attorney's fees, and for such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

Clyde E. Craig
900 Walnut Street, Suite 520
St. Louis, MO 63102
(314) 621-2776

Attorney for Defendant

Of Counsel:

Craig & Craig, P.C.

CERTIFICATE OF SERVICE

The foregoing Defendant's Motion for Summary Judgment on Counterclaim and Memorandum in support thereof were served on Plaintiff's attorney of record, John J. Moellering, 611 Olive Street, Suite 1400, St. Louis, Missouri 63101 by mailing a true copy thereof, correctly addressed and postage prepaid, on this _____ day of _____, 1991.

APPENDIX I

ARBITRATION OPINION AND AWARD

In the matter of arbitration	*	Grievances of Kenneth Youngermann
between	*	
COCA-COLA BOTTLING COMPANY OF ST. LOUIS,	*	Hearing Dates: October 4, 5, 6, 1989, and January 30, 31, 1990 and February 1, 2, 1990
and	*	
TEAMSTERS LOCAL UNION NO. 688	*	Briefs Received: July 17, 1990
	*	Award Date: September 17, 1990

Appearances:

For the Union: Clyde E. Craig, Esq.

For the Company: Ronald G. Ingham, Esq.

DISCUSSION AND POSITION OF THE PARTIES

This case involves a series of grievances on behalf of Mr. Kenneth Youngermann, the Grievant. In the pre-hearing brief submitted by the Company for the purpose of acquainting the arbitrator with individual grievances and basic facts as the Company then saw them, the grievances were numbered as arbitrations Nos. 1 through 11. At the hearing, grievance No. 9 was withdrawn. Nevertheless, at the hearing and in the post hearing briefs the Parties maintained the original numbering system, i.e. arbitrations Nos. 1-8 and 10, 11. This system will be followed in this opinion.

Arbitration No. 7 involves the Grievant's claim that he was denied an assignment in violation of Article 26, Section 8 of the 1987 Agreement between the Parties (hereinafter referred to as the Agreement). Arbitration No. 8 involves Grievant's claim for pay for attendance at a meeting which, the Union claims, was conducted "on the clock."

Arbitrations Nos. 1-6, 10 and 11 involve discipline and, ultimately, the Grievant's discharge. The Union claims that the Company did not have just cause for any of the disciplines in question.

The Grievant was hired by the Company in March of 1984 under a commission system which was changed into delivery system in 1987. He is a truck driver. Since the Company predicated the discharge also on progressive discipline under its Rules and Regulations (infra) it should be said that the Grievant received two disciplines for "A" violations (infra) prior to the discipline in arbitration No. 1 which was

issued on May 8, 1988 (Exhibit Arb. #1). The Union grieved the discipline in arbitration No. 1 and every subsequent discipline before this arbitrator. Ultimately, the Grievant was notified of his discharge by a Company letter dated May 1, 1989 (Exhibit Arb. #11).

From various remarks of counsel and some testimony it appears that the Parties engaged in negotiations to simplify the multitude of grievances involving the Grievant (which at some time exceeded the number submitted to this arbitrator) both before and after the discharge. Ultimately, all remaining grievances were submitted to this arbitrator, to be heard in a consolidated hearing. The hearing was held on October 4, 5 and 6, 1989, January 30, 31, 1990, and February 1 and 2, 1990. No transcript was made at the hearing.

While each of the grievances ("arbitrations") herein is based on its own facts which will be very briefly and selectively alluded to below, the hearing was dominated by the Company

proposition that this Grievant was not suited for employment with this Company, perhaps because of his temperament and lack of initiative. This theme is repeated in the Company Brief:

> Concerns for protracted litigation dictated the unusual steps of discipline now before this Arbitrator, e.g., Last Chance Agreement, 40-day disciplinary furloughs in lieu of discharge, etc., etc. Those steps were taken to minimize what Coca-Cola Bottling Company of St. Louis correctly perceived to be the Youngermann litigation route. In effect, from September, 1988 onward, Coca-Cola Bottling Company of St. Louis attempted to position itself with the Grievant and Teamsters Local 688 so as to minimize the potential for federal court litigation and enhance its arbitral chances if, in fact, such were to come. As before stated, in so doing, the Company embarked upon steps which were a departure from the normal disciplinary system.
>
> It is respectfully urged that the Arbitrator, in weighing this case, analyzing the evidence, and drawing his conclusions, be ever mindful of the conduct and demeanor of Grievant, Kenneth Youngermann, during this proceeding and as testified by a host of witnesses. Extraordinary steps were taken by the Company to salvage Grievant knowing full well that on the other side of salvage efforts, if unsuccessful, were massive litigation costs.

> The Coca-Cola Bottling Company of St. Louis wishes the Arbitrator to understand that a remedy short of reinstatement would be acceptable. In a highly competitive marketplace this Company can ill-afford to devote the time and energy to another Kenneth Youngermann reclamation project. Continuing rehabilitation programs for a person like Grievant are divisive; draining of management's manpower; and costly to the Company and employees who have an abiding interest in seeing the Company compete effectively and successfully in the marketplace. The record before this Arbitrator is replete with evidence that Grievant Kenneth Youngermann simply cannot or will not comply with management directives and rules of conduct other employees are obliged to follow.

The Union Brief begins with a variation of the same theme:

> This arbitration case is a mixture of the familiar and the unique. Taken separately, none of the eleven cases before the Arbitrator presents any novel issues or unusual circumstances; but taken as a whole the case presents a fairly shocking example of failed communication and damaged relationships. The Union does not intend to shoulder the burden of trying to fix the blame for that sorry state of affairs because, at least at this juncture, to do so does not contribute to an orderly resolution of the matter; but these circumstances cast a long shadow over the case as a whole, and contribute substantially to the difficulty of finding a proper resolution of the issues. (Union Brief at 1).

The Union presented a witness, James Craig Krueger, who testified that the Grievant was on a Company hit list. Krueger was a supervisor from August to October of 1987. In that capacity, he testified, he was instructed by Supervisor Lucas to take any problem employee, who did not perform, "on the side" and threaten him with discipline. Krueger testified that Lucas identified the Grievant as a problem employee, and instructed Krueger to write him up for failure to collect refunds. Mr. DeGrande, the Union Business Agent testified that he had never heard of a Company "hit list." The Company witnesses denied the existence of any hit list or any ulterior motive against the Grievant.

The Company view of the issues is as follows:

ISSUES BEFORE THE ARBITRATOR

A. Whether the September 6, 1988, Last Chance Agreement negotiated with Teamsters Local 688 Stewards is binding on it and the Grievant.

B. Whether the overwhelming weight of arbitral decisions find that Last-Chance Agreements warrant termination for any subsequent infraction without regard to "just cause" under a collective bargaining agreement.

C. Whether Grievant, with or without the September 6, 1988, Last-Chance Agreement was properly terminated on May 1, 1989, for having incurred seven (7) steps under the (A) rules (normally a five (5) step disciplinary system.)

1. Whether on May 5, 1988, Grievant was properly issued the fourth step of discipline for poor work performance under Rules A(12) and/or A(25) (Arbitration No. 1).

2. Whether on May 10, 1988, Grievant was properly issued the fourth step of discipline for poor work performance under Rules A(12) and/or A(25) (Arbitration No. 2).

3. Whether on September 6, 1988, Grievant was properly issued the fifth step of discipline, a ten (10) day disciplinary furlough and disqualified from his job in lieu of termination for violation of Rules A(12) and/or A(25) (Arbitration No. 5).

4. Whether on December 9, 1988, Grievant was properly issued a sixth step of discipline, a forty (40) day disciplinary furlough, in lieu of termination for violation of Rule A(25) for poor work performance, yet another chance after the September 6, 1988, "Last-Chance" Agreement (Arbitration No. 6).

5. Whether on May 1, 1989, Kenneth Youngermann was properly terminated, the seventh step of a five-step disciplinary procedure and the second "last-chance" incident after his September 6, 1988, Last-Chance Agreement (Arbitration No. 11).

D. Whether the following disciplines which are not a part of the ultimate disciplinary track leading to discharge on May 1, 1989, were for just cause or properly taken under the terms of the collective bargaining agreement.

1. Arbitration No. 3 - Two (2) day disciplinary furlough for unacceptable conduct and lack of cooperation.

2. Arbitration No. 4 - Ten (10) day disciplinary furlough effective July 22, 1988, for disorderly conduct, horseplay, etc. in violation of Rule B(6).

3. Arbitration No. 10 - A three (3) day disciplinary furlough on April 24, 1989, for failure to comply with Department of Transportation requirements.

E. Whether the contract was violated on April 3, 1989, when Grievant was denied a "hot-shot" job assignment (Arbitration No. 7).

F. Whether the contract was violated on April 11, 1989, when Grievant was denied one (1) hour pay for attending a meeting (Arbitration No. 8).

G. Whether Union witness James Krueger should be credited with regard to testimony about an employer "hit list."

H. Whether a Grievant who repeatedly testified his "memory wasn't good" and that he "couldn't remember" should be credited over other witnesses who testified to specific acts ultimately leading to termination under the prin-

ciples of Ford Motor Company, 1 ALAA ¶67,274 (1954); (other citations omitted).

The Union points out that the Company has a burden to prove just cause in case of each individual discipline, and emphasizes that a general testimony about the Grievant's performance, not set against actual productivity standards, is insufficient to sustain the burden of proof. The Union further suggests that as far as the credibility of the Company Supervisors is concerned, the usual proposition that supervisors are disinterested witnesses cannot apply in this case in which the Company admits that it was positioning itself to discharge the Grievant.

The relevant provisions of the Agreement read:

> The Employer may discharge or suspend an employee for just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of a related nature against such employee except that an employee may be immediately discharged for dishonesty, use of intoxicating beverages during working hours, use or possession of controlled substances other than prescription drugs, fight-

ing, willful negligence resulting in damage to person or property, disobeying a direct legal work order, or incidents of a more serious nature, and failure to report to work for three (3) days without calling in. As used in this paragraph, notices of discipline of a "related nature" fall into three (3) categories: work performance, misconduct, or absenteeism/-tardiness.

Notice of written warning and all disciplinary actions shall be given to the employee, the notice of suspension and discharge shall be sent by certified mail to the employee at his last known address, with a copy of all disciplinary action to the Local Union and Shop Steward.

ARTICLE 14. EMPLOYEE DISQUALIFICATION

Section 1. Employee Disqualification - Any employee disqualified by Employer action will be permitted to bump the most junior employee in a classification where his seniority carries him provided he is immediately qualified* to perform the work.

The employee will accept the rate of pay of the classification he bumps into.

The disqualified employee may exercise his seniority to bid on any opening that occurs, but will not be allowed to bump on openings within the classification he was disqualified from for a period of fifteen (15) months from the date of disqualification. Such employee will have a ten (10) day training period.

ARTICLE 26. HOURS OF WORK
(. . .)

Section 8. In the event that a Delivery person assigned to a route should refuse to make a delivery after returning to the facility, the Employer at a point in time will offer the work to other employees in the Drivers' Room on a seniority basis. If from the persons present in the Drivers' Room at the time of the solicitation, no employee agrees to perform the work the most junior employee present must perform such work.

ARTICLE 43. PROGRESSIVE DISCIPLINE

Progressive discipline will be followed in the three (3) general categories referenced in Article 13: absenteeism/tardiness, work performance, and/or misconduct.

1. First offense - counseling (documented).

2. Second offense - next offense within six (6) months of the prior offense - written warning.

3. Third offense - next offense within six (6) months of the prior offense - three (3) days suspension.

4. Fourth offense - next offense within six (6) months of the prior offense - ten (10) days suspension.

5. Fifth offense - next offense within six (6) months of the prior offense - discharge.

The above procedure is set out for progressive discipline of offenses that occur within six (6) months of the prior offense. The following is the procedure that applies if the offense occurs after the six (6) month period:

1. The next offense that occurs between the seventh (7th) and twelfth (12th) month of the previous offense - repeat the previous step.

2. After the twelve (12) months of the prior offense the employee will have his record cleared.

The Company Rules and Regulations (Exhibit #12) read in part:

DISCIPLINARY PROCEDURE

Reasonable rules application to employees is necessary for efficient production and the orderly conduct of business. Management recognizes that violations of certain rules are more disruptive and costly than others. The rules and regulations for employees have been divided into three (3) categories, A, B, & C depending on the seriousness of a violation in each category.

In order to insure consistent application and enforcement of the Rules & Regulations, employees will be subject to the following disciplinary procedure for violation of any rule in the following categories.

Violations of different rules in the same category, depending on the circumstances, will be treated the same as multiple violations of one rule in the category.

Category A: Violation of rules in this category, depending on the circumstances, will be treated the same as multiple violations of one rule in the category.

1st Offense - Documented Counseling Warning

2nd Offense - Written disciplinary warning notification.

3rd Offense - Three (3) day suspension, without compensation.

4th Offense - Ten (10) day suspension, without compensation.

5th Offense - Immediate suspension, without compensation pending investigation for termination.

Category B: Violation of rules in this category will warrant the following disciplinary action:

1st Offense - Ten (10) day suspension, without compensation.

2nd Offense - Immediate suspension, without compensation pending investigation for termination.

Category C: Violations of rules in this category will warrant the following disciplinary action:

1st Offense - Immediate suspension, without compensation pending investigation for termination.

Disciplinary actions in categories A and B will remain in effect for a period of six (6) months. After six (6) months without further disciplinary action, an employee will be returned to the next preceding step in progressive discipline until all steps have been removed from the employee's current record.

Employees will be given a copy of all violation notices.

CATEGORY A

A-1) Each employee is responsible for the orderliness of the area or assigned vehicle in which they work and is asked to keep it clean at all times.

(. . .)

A-10) Employees must punch out their timecards when leaving the plant during work time. Timecards must be punched in daily when entering and leaving the building.

(. . .)

A-12) Employees must have the skill and ability to perform satisfactorily in the classification to which they are assigned and for which they are paid. Inability to meet standards of production in quantity and quality of work will subject an employee to corrective discipline and/or termination.

(. . .)

A-18) Failure to use designated safety devices, equipment, requirements, and/or procedures is strictly prohibited at all times.

(. . .)

A-25) Poor work performance, including carelessness, inefficiency, and inattention to duties is prohibited.

(. . .)

B-6) Disorderly conduct, horseplay, running, practical jokes and/or pranks while on company property or during the performance of company responsibilities. Such conduct resulting in personal injury, damages to equipment or property will result in more severe disciplinary action, including discharge.

A copy of the document dated September 6, 1988 referred to by the Company as "Last-Chance Agreement" is appended to this award because the document's form, and the placement of signatures are of significance for its interpretation. The document reads in part as follows:

> Pursuant to the Union's recommendation on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform

satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section #1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next such occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its right in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations of Category

A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis

The document is signed by Supervisors Coy and Roustio and Stewards Becker and Tinsley. The Grievant refused to sign it.

During the time here in question the Grievant worked as an Extra-man prior to his disqualification on September 6, 1988. As an Extra-man he drove in relief and bid on available routes each day. He received a regular route after September 6, 1988. At the arbitration hearing the Grievant explained various delays and other problems, such as inartful backing up to a dock, by the lack of familiarity with trucks of different sizes, the lack of familiarity with routes, locations of accounts (e.g. St. Louis Children's Hospital), etc. There was no suggestion that any other driver had similar problems, or that the Grievant was treated differently with respect to equipment, routes, etc. It is uncontroverted that the Company took some extra steps to aid the Grievant. For instance, after

his disqualification the Grievant received two week extra training, five days with a Supervisor and five days with an experienced driver - a Shop Steward. The Supervisor, George Pratt testified of lack of cooperation, of such oddities as continuous driving in the first gear. The Steward admitted that he had never heard of extra training for a driver with the Grievant's length of service. Since Grievant had problems in getting out of the Company premises in the morning, at the Union suggestion his truck was placed in front of the line in March of 1989.

Sometimes the Grievant's behavior was outright bizarre. He refused to sign anything, including a consent form in a hospital where he was administered drug and alcohol tests. On that occasion, a Steward had to tell him that the failure to sign had significant disciplinary consequences. Despite the fact that a cashier counts through a "money changer" change which drivers bring in, the Grievant spent around one hour (on overtime) counting his change himself.

He testified he "normally" counted change himself. Cashier Clerk Carolyn York testified that the Grievant stapled together some twenty dollar bills before giving them to her. The Grievant surreptitiously taped a Union meeting. It was the Company which found the tape. The Grievant, while on a suspension, photographed supervisors and their cars. He testified that he followed Supervisors to learn whether they performed Union work. There was no suggestion that he did this on behalf of the Union. Once, when a Supervisor tried to talk to him he rolled up the window of his truck.

Following is a brief account of some evidence and claims involved in the individual arbitrations.

Arbitration #1

Three day suspension issued for violation of sections A-12 and A-25 on May 6, 1988. Grievant seeks three days of pay.

Company argues that the Grievant "failed to meet standards of production in quantity and

quality of work "because he took 12.7 compensable hours to complete one day's work," and could not explain any major delays. The Union argues that this discipline is unfair because it is based purely on Supervisor Davis' subjective analysis of the time it should take to complete that route. Further, the supervisor failed to consider the facts that Grievant was working as an extra man and was unfamiliar with the route, or that the route involved significantly more merchandising and a higher than average number of cases to be delivered.

Merchandising Supervisor Davis testified that when the Grievant returned he asked him for his itinerary. The Grievant refused to give him one half of the computer sheet which should have contained relevant information on the cases, merchandising, problems, etc. The Grievant stated that the itinerary was his personal property. The Grievant did not advise Mr. Davis on any problems on the route. Supervisor Jim Sieve drove the Grievant's route in a passenger

car and concurred in the conclusion that the Grievant's time was excessive.

The Grievant testified that he did his best.

Arbitration #2

Ten day suspension issued for violation of Sections A-25 and A-12 on May 10, 1988. Grievant seeks ten days of pay.

The Company disciplined the Grievant for poor performance and essentially for inefficiency because he failed to service all of "A" load accounts and failed to service any of his "B" load accounts for that day. Part of the delay occurred in the morning due to Grievant's inability to find Fran Deutchman's dock, with which he should have been familiar, and because the Grievant then took over twenty minutes to back into the dock.

The Union notes that this charge of excessive delay in completing work assignments is judged by completely subjective standards rather than by any established production standards,

thus depriving Grievant of notice and of a fair standard. The Union also argues that the Company's failure to provide a pallet jack that morning required the Grievant to go to Fran Deutchman's dock, with which Grievant was unfamiliar, causing part of the morning delay. The Grievant had difficulty backing the truck up because he was also unfamiliar with the truck he was driving. The Grievant was further delayed because the truck was too heavily loaded to get into Children's Hospital, necessitating a second stop there when the truck was lighter. The delivery to Marriott Foods at Monsanto took additional time because the Grievant had to wait for the person responsible for receiving merchandise. This was also Grievant's first time driving an "in-feeder" route.

Except for the Grievant, everybody at the hearing confirmed that everybody knew where Fran Deutchman's dock was. The Grievant also testified that he had difficulties with backing up his truck to which he was not accustomed. The

Company testimony that the truck was of a type he as a driver was familiar with was not controverted.

Much of the testimony involved such questions as the time needed to drive to St. Louis Children's Hospital from Maryland Heights, etc. It is noteworthy that the Union witnesses who estimated 30-45 minutes time found it impossible to stretch the time estimates to one hour, which was the Grievant's testimony. The Grievant testified that he did not know where the Children's Hospital was. A sketch which a supervisor made him that morning was introduced into evidence.

Arbitration #3

Two day suspension issued for unacceptable conduct and lack of cooperation in July of 1988. The Grievant seeks two days of pay.

The Union notes that no disciplinary action notice exists for this incident and that the Company originally told the Grievant on July 1 that he was fired, without a reason, but then

said he would only be suspended. The Company indicated that the suspension was for a remark suggesting suicide to a co-worker which the Union says was, in fact, just a sarcastic remark.

Chris Stratmeyer, a Checker, testified that the Grievant disrupted his count of undelivered merchandise, and once told him that he should commit suicide. Stratmeyer testified that these incidents occurred sometime in June. He also testified that he was afraid of the Grievant. The Grievant testified that he made a sarcastic remark to Stratmeyer.

Arbitration #4

Ten day suspension issued for B-6 violation on July 21, 1988. Grievant seeks ten days pay. This arbitration involves a somewhat peculiar behavior of the Grievant after he was involved in an accident.

The Company argues that while awaiting a drug test (required because of the accident), the Grievant began climbing in and out of a

window, touched the hair of and made unfavorable comments to co-worker Beverly Ellis, and hit a wall causing slight damage.

The Union argues that the Grievant was merely joking around with co-worker Ellis and supervisor, Rufus Hinton, that Ms. Ellis did not appear to be disturbed at the time, and that if the Grievant had really been out of line, the supervisor could have and would have taken control at the time. Further the Union notes that the Company failed to provide the statements regarding the incident of Ms. Ellis and Mr. Hinton until this hearing.

Computer Operator Beverly Ellis testified that the Grievant climbed through a window between two rooms, put his fingers through her hair, told her that she had a bald spot, lifted her arm and commented on underarm hair of European woman. She testified that although she had an impression that the Grievant tried "to be funny," she did not like his behavior, it bothered her, and she reported it to Supervisor Hinton. Mr. Hinton so testified.

The Grievant testified that he did not touch Ms. Ellis, and in any event, that he did not mean any harm.

Arbitration #5

Ten day suspension issued for violation of Rule A-25 during the week of August 15 through August 19, 1988. Grievant seeks ten days of pay.

The Company contends that it based this discipline on three incidents. First, on August 16 Grievant performed inefficiently resulting in approximately six hours of unnecessary overtime. On August 17 Pronto Enterprises, Inc. complained and asked that Grievant be removed from their account after he lost his temper and used profanity in front of customers, and Walmart also said that they did not want the Grievant servicing their account.

The Company further contends that this discipline constituted Grievant's fifth "A" violation which gave the Company the right to discharge him. Upon the Union's recommendation,

however, the Company agreed instead to a ten day suspension and disqualification as an Extra Relief Driver under a last chance agreement. Noting that the Union representative suggested the "last chance," read and signed the disciplinary action notice, and that the Union and the Grievant took the benefit of the agreement, the Company asserts that they cannot now deny that the agreement is what it purports to be.

The Union first asserts that on August 16 the Grievant's performance was evaluated by a supervisor who did not observe the run and who was unaware of the circumstances of that day's route, which included a considerable amount of merchandising and a stop at the Washington, Missouri Walmart where drivers are often delayed in being serviced. The Union further notes that the supervisor who observed Grievant on August 17, only joined him after his fifth step and was unaware of various circumstances of the day.

The Union contends that the Company failed to apprise the Grievant of the nature or source

of the customer complaints. The Union asserts that considering the number of accounts serviced by each driver, it would be impossible not to have friction on at least a few of them, and that these two complaints must be weighed against all of the other accounts which did not complain.

The Union also argues that the Union Stewards did not suggest or agree to a last chance agreement in this instance and that the Union Steward's signature on the disciplinary action form merely indicates receipt of the document, consistent with uniform practice. Further, the Grievant never consented to the last chance agreement and thus was not aware of the tenuous position of his continued employment. Moreover, the Union contends that failure to invoke the right to discharge the Grievant for the next offense (arbitration #6), demonstrated that the Company did not believe that it had a last chance agreement. Finally, the Union asserts that regardless of future effect, there is no

evidence, express or implied, of an agreement to waive or withdraw any pending grievances about prior discipline. In support of this point, the Union notes that in arbitration #6 the Company specifically proposed a settlement which included withdrawal of all pending grievances and asserts that this proposal would have been unnecessary and nonsensical if an agreement wiping out prior grievances were in effect.

The Parties stipulated that the Grievant, who received a 10 day suspension, was, in fact suspended 11 days (see "Return to Work" in the appended notice). It was agreed that the eleventh day of suspension occurred because of a mathematical error and that the Grievant was entitled to one day of pay even if the grievance were denied.

Supervisor Roustio testified that due to the Grievant's performance on August 16, 1988 he drove the Grievant's route on August 17 to see if there were any problems. He observed the Grievant on the road. He talked to personnel at

Walmart and Pronto stores and asked them to put their complaints in writing (See Exhibit Arb. #5).

Don Rice and Jean Hanneke of Pronto Enterprises testified that when the Grievant was told to put the merchandise outside of the cooler so that it could be counted he used profane language, "threw six packs around," and was generally rude. They testified that they did not want the Grievant to service the store.

Joanne Schwoppe of Walmart testified that she did not want the Grievant to continue delivery to the store because he was rude and refused to bring in the merchandise with a manual jack.

The Grievant was suspended pending investigation. On September 6, 1988 there was a meeting in the office of Human Resources Manager Curt Wacker. Mr. Wacker, Distribution Manager Jerry Coy and Mr. Roustio, and the Grievant and Stewards Becker and Tinsley attended the meeting.

The Company viewed the events as representing the fifth step of progressive discipline. In the Company's version of events the Grievant was told that there were complaints from customers (although the customers were probably not identified), and that the Company was considering discharge. The Company witnesses testified that Mr. Becker suggested that the Grievant be disqualified as an Extra-man and be given a regular route. The Company representatives caucused, drafted the September 6 "last chance agreement," and had it typed. It was read to the Grievant. Both Stewards read it and signed it in front and on the reverse side (see appendix). Nobody voiced any objections.

Union Business Agent Kenneth DeGrande testified that the Company had complained about refusal of stewards and employees to sign documents, and that it was agreed that documents would be signed for acknowledgement purposes only. Stewards Becker and Tinsley testified that they signed the document as witnesses only.

They denied that they agreed to a "last chance agreement."

Steward Tinsley testified that the meeting lasted some 40 minutes. "I can't remember we said anything," he testified. He could not recall if the Grievant said anything. He testified that the subsequent grievances (infra) were drafted by the Grievant.

Steward Becker testified: "Tinsley and I were called in, we got to the issue of discipline for Grievant, that's when they put [the "last chance agreement"] before us, we discussed it somewhat, I do not recall the discussion, but I recall the extra man disqualification. . . . I did not recommend this discipline. . . . I read it before I signed it, yes. . . . I read "pursuant to Union recommendation" . . . but it was their language." Mr. Becker testified that he did not recall if there was any discussion about discharge. On cross examination Mr. Becker testified that he did not recall specifics of the meeting.

The Grievant testified that at the beginning of the meeting Wacker "threw up some dates in the air," asked him what happened and mentioned customer complaints. The Grievant did not recall whether he was present when Stewards signed it. He testified that he saw the "last chance agreement" only "when stewards brought it out."

Three grievances, signed by Tinsley and the Grievant were filed. Union Exhibit 27, dated September 6, 1988 reads:

> In the ongoing systematic harassment of grievant; the Johnston Coca-Cola Bottling Group and or its representatives have again conspired to discredit grievant's reputation.
>
> In violation of Article 14 and any other article which may apply. Representatives of the Coca-Cola Company have unjustly disqualified grievant from his position of Bid Extra Man. Coca-Cola and or its representatives have not nor will not furnish any evidence to warrant the aforementioned action.
>
> SETTLEMENT
>
> To be reinstated to my position of Bid Extra man.

Union Exhibit 28 dated September 7 reads:

> In the ongoing systematic harassment of grievant; the Johnston Coca-Cola Bottling Group and or its representatives have again conspired to discredit grievant's reputation.
>
> In violation of Articles 13, 43 and any other article which may apply. Representatives of the Coca-Cola Bottling Company have given grievant an unjust eleven day suspension.
>
> SETTLEMENT
>
> To have this letter expunged from my record and be made whole in every way. This includes back pay for eleven days suspension, (Plus any projected overtime) and as outlined in Article 35, to be paid for Labor Day. Also to be paid for two Saturdays grievant was eligible for work.

Union Exhibit 29 dated September 8 reads:

> In violation of any article which may apply. Due to the Company's actions surrounding grievant disqualifications as an Extra Man; Company representatives refused to give grievant sufficient time to review the routes presented to him. Subsequently, causing the loss of one day's pay.
>
> Settlement
> To be paid for one day. (Plus any projected overtime).

Arbitration #6

Forty day suspension for violation of Rule A-25 on December 5 and 6, 1988. The Grievant seeks forty days of pay.

The Company asserts that on December 5 Supervisor Lucas notices that the Grievant seemed to be having great difficulty getting organized and Lucas had to advise him on basic procedure such as window washing. On December 6 the Grievant refused to move a Pepsi display as requested by the National store manager. All delivery persons are required to accommodate and follow such instructions from store managers. Although the Grievant called the Company and reported that this move would take two to three hours, the two Company men who came to help found, instead, a ten minute job.

Also on December 6, Supervisors Sieve and Juenger followed Grievant on his route and found that he made deliveries in no logical fashion. He would drive past accounts to more distant

stops, and then the accounts he had passed would be unable or unwilling to accept delivery when he subsequently arrived.

Additionally evidence of the Grievant's inefficiency is the fact that on December 6th, he spent inordinate amounts of time testing a problem light bulb, and counting his inventory, even with the assistance of Supervisor Roustio. The Company notes that the general level of inefficiency is even more unacceptable in view of the additional two weeks of training given to Grievant after the resolution of Arbitration #5.

The Company finally asserts that between his suspension on December 6 and his return on February 9, the Grievant was advised several times that the attorneys were dealing with the situation. The Union argues, however, that the Grievant was suspended without any explanation until his return to work.

The Union further contends that Supervisor Lucas' testimony as to the Grievant's delay in getting on the road on December 5 and 6, and his

criticism of the Grievant's route are not credible in view of testimony that Supervisor Lucas was looking for Grievant's faults and are invalid because his criticisms were based on totally subjective criteria.

The Union asserts that at the hearing the Grievant was able to explain apparent inconsistencies in his December 6 route and obviously could have explained them earlier if the Company had only asked him. For example, he was unable to make one delivery because the customer was not there and another because the person responsible for paying could not be located. Moreover, the Company cannot complain that the Grievant chose a particular route, when the Company fails to sequence deliveries for the drivers.

As to the National store incident, the Grievant called the Company per its instructions to obtain approval prior to undertaking work (such as moving the Pepsi display), and then waited for additional personnel to arrive, again, as instructed by the Company.

Finally, the Union argues that the Grievant was entitled to know the length of his suspension and the reason for it. But the Grievant learned early on only from the Union's attorneys that customer complaints (with no specifics as to the source or nature) were involved, and then, upon his return, only low productivity was discussed.

The evidence at the arbitration hearing leaves no doubt that both Parties and counsel discussed the whole range of issues involving the Grievant during his suspension. The Grievant testified that he was aware of these discussions.

Arbitration #7

Union claims that Supervisor Hinton gave a hot shot delivery to a junior employee although the Grievant was available and the junior employee did not object to the Grievant taking it. The Company argues that the hot shot was assigned to a junior employee who was already

checked in, that the Grievant was not checked in, and that hot shots are usually not reassigned.

The Grievant seeks reimbursement of one and a half hours of pay.

Supervisor Hinton who assigned the hot shot to Fred Morris, a driver junior to the Grievant, testified that after the assignment Morris was leaving the room, the Grievant was entering the room, and the Grievant wanted to bump Morris. He further testified that he gave the Grievant direct order to return invoices to Morris. While various Company witnesses seemed to stress that hot shot is given only to employees who checked in, Hinton himself, in his testimony on October 5, 1989 testified that employees in the room are entitled to a hot shot even if they did not check in.

Morris testified that he gave the hot shot in question to the Grievant when the Grievant asked him for it. He testified that on average there are some 2-3 hot shots per week, that he

has passed many to junior drivers, and to senior drivers who asked for it. He testified that the Supervisor who made the assignment is notified of the change, and that he has never heard of any supervisory objection except for this one instance with the Grievant.

Steward Ted Boss, an impressive and highly credible witness testified that under the practice a junior employee who is assigned hot shot does not have to relinquish it to a senior driver, but if he does, the hot shot belongs to the senior driver.

After this testimony, Hinton was recalled and testified that there were occasions when drivers passed hot shots to each other, but, they were all checked in and there was no delay.

Arbitration #8

The Union contends that Supervisor Pratt told the Grievant not to check out at the end of the day and to attend a meeting. The Company argues that the Grievant was not told to remain

on the clock and that to do so would violate an established practice of unpaid, after work meetings.

The Grievant seeks reimbursement of one hour of pay.

This case involves a meeting on April 11, 1989 in which Mr. Roustio wanted to discuss with the Grievant a complaint from the Walmart store in Highland, Illinois. No discipline was intended.

The meeting was conducted in the afternoon. The Company witnesses testified that all afternoon meetings are conducted after clocking out. The Union witnesses testified that the rule had exceptions. However, they testified that in this case the Grievant was specifically advised that the meeting was "on the clock."

Supervisor Pratt who informed the Grievant of the meeting, testified that he did not tell the Grievant not to punch out but, otherwise, did not remember what he told him. Supervisor Ryan testified that he did not recall telling the Grievant not to punch out.

The Grievant requested Becker and Ted Boss to attend the meeting. The Grievant testified that he was told by Pratt not to clock out. Becker testified that the Grievant told him that he had been instructed not to clock out. Becker testified that Ted Boss asked Ryan if he knew that the Grievant was on the clock, and Ryan responded in the affirmative. Ted Boss testified that the Grievant came to him and asked him to come to the meeting with his time card at hand. Ted Boss inquired about the time card and was told that the Grievant was instructed not to clock out. Since that was unusual, Ted Boss testified, he inquired from Pratt and was told that the Grievant was indeed told not to clock out.

Arbitration #10 and 11

These two arbitrations involve three alleged "A" infractions for violations of Rule A-18, A-10 and A-1, discovered after the Grievant's suspension on April 19, 1989 which, the Company concedes, was without merit. Arbitra-

tion #10 involves failure to properly complete the Driver's Inspection Report (A-18 violation) on April 14, 1989. Arbitration #11 involves a failure to punch out at the end of his shift (A-10 violation) on April 19, 1989.

The Company asserts that on April 19, 1989 Supervisor Roustio held an instructional (as opposed to a disciplinary) meeting with the Grievant to discuss some work-related problems. When the Grievant became defensive and critical of the Company and Roustio, Roustio lost his temper and suspended the Grievant for insubordination.

Following the meeting, Supervisor Ryan inspected the Grievant's truck and found it full of trash and a mess. The Company subsequently discovered that the Grievant failed to punch out at the end of the workday on April 18 (although he had been previously warned about this), and that he failed to properly fill out a Department of Transportation record on April 14.

The Company argues that the termination

decision was based on at least seven rule infractions and that the attempts at corrective discipline had had no effect. The Company also contends that under the so-called last chance agreement it had the right to terminate the Grievant for any infraction, regardless of just cause, but in fact the Grievant committed a number of infractions which met and exceeded the just cause test.

In view of Roustio's admitted loss of temper in the April 19 counseling meeting, the Union first argues that the three infractions in issue were manufactured by the Company to support Roustio's suspension and to get rid of a thorny employee. Moreover, in the Union's opinion, the charges are ludicrously insubstantial. For example, the error on the Department of Transportation form involves the inadvertent transposition on the driver's inspection report of two numbers of the hot shot truck he was driving. Similarly, the Grievant simply forgot to punch out one day -- a de minimis violation

for which many other employees were not even disciplined. Finally, the Company failed to prove that the mess in the truck belonged to the Grievant because another driver drove the truck after the Grievant and before the inspection. Even if this were the Grievant's mess, a messy truck is simply insufficient grounds for discharge. In sum, the Company lacked just cause for discharge.

The meeting on April 19 was conducted in the morning. The money changer incident and two other incidents were discussed. Mr. Roustio testified that the Grievant became argumentative. He (Roustio) lost his temper and suspended the Grievant. The Grievant asked him why he was suspended, and Roustio responded "we start with insubordination." Roustio candidly admitted that there was no reason for discipline, that the Grievant would have been paid for that day. Roustio testified that he suspended the Grievant because he believed that the Grievant was not in a proper frame of mind to service

clients that day. Mr. Becker and Supervisor Ryan attended the meeting. During his first direct examination, Mr. Roustio testified on October 5, 1989 that after the meeting Ryan brought to Mr. Roustio's attention that the Grievant did not clock out on April 18, that he did not properly fill in DOT inspection, and that the cab of his truck was full of trash.

As far as the trash is concerned, Roustio and Ryan testified that it was lunch trash of several days and "at least 12 cans of soda, most of them empty." A photograph made that morning was shown to the arbitrator. The truck was then driven by another employee (the Grievant's route) and in the evening shown to Union Stewards. They testified that there was card board box cover with some trash, and some paper signs. Mr. Ryan testified on October 5, 1989 that he had seen "vehicles in that disarray before."

The Grievant indeed did not clock out on April 18, 1989. Mr. Ryan testified - also on

October 5, 1989 - that the Grievant had advised him before the morning meeting that he forgot to clock out the previous evening.

Mr. Roustio further testified on October 5, 1989 that the termination meeting (probably on April 21, 1989 attended by a Steward, the Grievant, Roustio, Coy and Wacker, the Grievant was told of the three violations. The Company decided to terminate his employment.

When Mr. Roustio testified on October 5 about the DOT form, he simply testified that he did not know what was the Grievant's truck number, but that he knew that it was not the number which appears on the form - 65204 - because there was no such tractor.

The Grievant testified during the January 30-February 2, 1990 phase of the hearing. He first testified that he made an inadvertent mistake, that the number of the truck was 65024 rather than 65204. Mr. Roustio then volunteered that the Grievant's truck number was in fact 65005. The Grievant agreed. He testified that

he was driving 65024 that afternoon because it was somebody else's truck in which he (the Grievant) delivered a hot shot. It became apparent to the arbitrator that the Company was surprised by this testimony. The arbitrator directed the Company to check the records.

On February 2, 1990 the Company advised the arbitrator of the result of its investigation: DOT forms were kept only 6 months, consequently only the DOT form in question filled in by the Grievant (Exhibit Arb. #10) was kept. Truck number 65024 was in the Company fleet. The Grievant indeed delivered hot shot on April 14, 1989. The hot shot paper work was introduced into evidence as Company Exhibit 24b. The truck number was not filled in that package. The Company stated that it should be filled in; that it is sometimes filled in by a dispatcher, sometimes by supervisors, sometimes by drivers.

Ted Boss named three employees who were warned for not clocking out, and one employee

who was not disciplined. Two employees were counseled for a dirty truck; employees have been disciplined for failure to fill in DOT forms.

Disciplinary Action Notice in arbitration no. 10 (Exhibit Arb. #10) is dated April 20, 1989 and reads in part:

> A-18 Failure to use designated safety devices, equipment, requirements, and/or procedures is strictly prohibited at all times.
>
> Driver did not properly complete the driver's inspection Report which is a daily requirement.
>
> On Friday 14 April 1989, Ken Youngermann did not properly fill out his Driver's Inspection Report.
>
> This is your third violation the others were on 3 Mar 1989, and 16 Nov 89. (sic).

The discharge letter dated May 1, 1989 reads:

> The purpose of this letter is to inform you of the termination of your employment with The Coca-Cola Bottling Company of St. Louis, effective April 18, 1989. The termination is based upon the results of our investigation concerning your continuing violations of multiple Category A Rules (see enclosed violations) in conjunction with Company Rules and Regulations dated January 18, 1988.

> Further evidence of your continued disregard for progressive discipline, as outlined in our Company Rules and Regulations and our current Labor Agreement with Local #688 was displayed by your actions on April 19, 1989 with your verbal abuse and poor attitude which occurred during your meeting with Rick Roustio.
>
> This termination is in accordance with Article #43 of the current Labor Agreement between The Coca-Cola Bottling Company of St. Louis and Teamsters Local #688.
>
> Any questions regarding this matter should be directed to the Human Resources Department.

With respect to the overall evaluation of the case the Company argues with reference to several published awards that under last chance agreements the only issue is whether an infraction occurred; if it did, the agreement was violated and the consequences there stated must occur, whether or not the violation would otherwise represent just cause for discharge. The Company Brief reads in part:

> B. The Arbitrator's Remedial Authority
>
> The Arbitrator specifically requested that counsel brief the issue of the range of authority an arbitrator possesses to fashion remedies. An arbitrator has wide-ranging authority

to provide a remedy which is fair and equitable to both parties. Many arbitrators have recognized that often both parties may be at some fault, thus necessitating a remedy which takes into account the mutual wrongs. An example of such a remedy is presented by Arbitrator Woolf's decision in Chromalloy American Corp., 93 LA 828 (Woolf 1989).

In Chromalloy, Arbitrator Woolf refused to reinstate an employee whose termination was procedurally defective. In this case, the Company had the necessary substantive elements of just cause to discharge the employee. However, the Company violated important procedural elements of just cause in failing to conduct a complete investigation before deciding on and implementing the discharge and post-discharge grievance meeting. To remedy this procedural error, the arbitrator awarded the employee payment of back pay and benefits for the period from the date of his discharge to the first business day after the last arbitration hearing day. However, the employee's request for reinstatement was denied.

Besides the Company's procedural error, the arbitrator also found that the employee's conduct, for which he was discharged, was serious, unacceptable and a flagrant violation of policy. Further, the Company proved this behavior in a clear and convincing manner which showed just cause for the employee's discharge. Therefore, the arbitrator refused to require reinstatement of the employee. In essence, Arbitrator Woolf's remedy

compensated the employee for the Company's procedural error, while recognizing the Company's interest in terminating an employee for just cause.

The decision in Kaiser Steel Corp., 78 LA 185 (Lennard 1982), provides a further example of fashioning a remedy under circumstances where both parties were at error. In Kaiser Steel, Arbitrator Lennard found that the employer had violated the contract between the Company and employees when it dismissed the grievant. The employer failed to have a required hearing before the dismissal of the employee was final. However, since the arbitrator found the dismissal to have been for proper cause, the remedy was an award of back pay and not reinstatement.

In one further case, Arbitrator Bressler fashioned an appropriate remedy considering the employer's procedural error. In Lancaster Electro Plating, 93 LA 203 (Bressler 1989), an employee violated company policy by refusing a direct order to load 28 pounds of parts into barrels for processing, thus restricting output. The arbitrator found that there was just cause for the employer to discharge the employee, however, the suspension was technically flawed by the employer's failure to afford the employee representation prior to suspending him. The arbitrator found that the technical flaw in the suspension does not effect the discharge of the employee for cause. Therefore, the arbitrator denied reinstatement but allowed the grievant back pay for the period between the suspension and

the discharge.

Applying the reasoning from the decisions discussed above, it is evidence that the arbitrator in this case may fashion an appropriate remedy considering both sides. If the arbitrator determines that the Company violated procedure in terminating the employee, the arbitrator must also look to see if there was proper cause for the termination or if there is any hope of rehabilitating the Grievant's work habit and ethic. The entire record of the grievant must be reviewed to consider whether the employee could have been terminated; whether the procedure was followed correctly or not; and whether Grievant should have any remedy short of reinstatement. In short, the arbitrator can fashion any remedy he chooses.

The Union Brief reads in part:

III. Remedy

Where then does that leave us? As stated at the outset, the Union is fully aware that this case has ramifications beyond itself. The just cause standard requires that unreasonable employer discipline be negated. On the other hand, when emotions have reached such a high pitch and positions become so hardened and entrenched as obviously is the case here, merely ordering reinstatement and back pay is not the complete answer. In this case, it would merely result in the resumption of the conflict which erupted into this arbitration case.

On the other hand, the evidence does not establish that the Grievant is the monster which the Employer perceives him to be; and he may not justly be deprived of a remedy merely because he has become a source of irritation to the Employer. Indeed, that would render just cause illusory, and arbitration a meaningless exercise of futility.

What is required here, therefore, is the creative structuring of a remedy which preserves the Employer's legitimate prerogatives to manage its work force, and insulates the employee from irrational or oppressive treatment, and gives him a reasonable opportunity to demonstrate his ability to perform satisfactorily, and, in those areas needed, to improve his performance. To that end, the Union suggests that an independent buffer between the Employer and the Grievant must be established. To accomplish that, the Union suggests that the Arbitrator require the parties to negotiate about a plan along the following lines:

1. Periodic performance reviews of the Grievant followed by discussions between the parties about methods of achieving and maintaining acceptable levels of performance.

2. Review by an independent third party for suggestions and advice prior to imposing any discipline on the Grievant with the opportunity for the Union to have input in the review.

3. An expedited arbitration procedure in the event the Employer decides to impose discipline after review so that the issues are resolved promptly.

4. Of course, on the specific disciplinary issues, the Union requests reinstatement without loss of seniority and with full back pay and contractual benefits; and on the contract disputes, the Union requests pay as indicated.

FINDING

1. The views of the Parties on the nature of this case and on the remedy accentuate the difficulty of this entire case which is manifested by two seemingly incongruous conclusions. One conclusion is that the Company proved that it and the Grievant have indeed been mismatched. In fact, the Company proved even more. At least on this record, the Grievant appears to be generally an uncooperative employee, interested more in endless and obstreperous quarrelling about what he perceives to be his "rights" than in working for his employer. Sometimes his testimony bordered on an invitation to doubt his ability to be a truck driver, as, for instance, when he testified that he might not remember location of his accounts even after he had serviced them. The foregoing had to be said

explicitly because the holdings in several individual arbitrations herein manifest that conclusion, and, also, because the arbitrator finds it necessary to point out that this award may not be presented as sanctioning the Grievant's behavior. Namely, the other conclusion is that as far as the Grievant's discharge is concerned, he must be reinstated and made whole from the effective date of his discharge. As will be apparent below, that conclusion is made on a very narrow ground.

2. The two conclusions appear incongruous because poor disciplinary record and poor attitude towards the employer is an aggravating circumstance in evaluation of just cause in discharge cases. In other words, if an employee committed an infraction of some significance, such an aggravating circumstance may justify discharge (and as such be an element of just cause) even if the infraction, standing alone, would not ordinarily be just cause for discharge. However, the unassailable proposition

that the two conclusions are not mutually exclusive is an inherent feature of decisionmaking process - arbitration, as opposed to a compromise reached through mediation or negotiation.

3. Under an employment agreement which has a discharge for cause provision (as opposed to at-will relationship), be it a basic labor agreement or a last chance agreement, an employee may be discharged only for an act or omission, which is often referred to as the triggering event, and which is prohibited. Labor arbitrators must engage in a three step analysis. The first step is represented by the question of whether the triggering event occurred. If the answer is in the affirmative the next question is whether the triggering event represents an infraction under the agreement, whether there is a defense, etc. The third step is the determination of proportionality of discharge unless the contract mandates an exclu-

sive remedy.[1] In most cases the employer's determination provides the starting point of inquiry. For instance, the Company herein alleges that the Grievant failed to fill in DOT form properly, kept trash in his truck, and did not clock out. The Company further alleges that these three acts or omissions are infractions under specific ("A") rules; the Company discharged the Grievant for these specific violations. The Company does not say that it discharged the Grievant for twelve months of poor attitude, and it does not identify any provision which would allow it to discharge for that reason.

4. The Parties chose this arbitrator as arbitrator, under specific contractual provi-

[1]The process is easily illustrated. For instance an employee is discharged for using word X under a rule which prohibits profane language. The questions are: Did he use X word; if so, is the word a profanity under common sense, or even if it is, is it an accepted shop talk, etc.; even if the word is a profanity under the rule, is it just cause for discharge, or for some lesser discipline.

sions on just cause and progressive discipline. Although their formulations of the issues differ, the core issue in the discharge arbitration is a routine one: was the Grievant discharged for cause, and if not, what is the proper remedy under the Agreement.[2] The Parties did not authorize this arbitrator by an express agreement to provide them with the best practical settlement -- i.e. to impose his idea of a compromise because they failed to agree on one. If the arbitrator did so without an express agreement he would exceed his authority and violate the Labor Agreement. Conceptually, without any specific agreement of the Parties, the arbitrator's remedial choices are limited - under this Agreement and with respect to the discharge grievance - to denying or sustaining the grievance, or to reinstatement with some back pay or no back pay, as long as it is considered a

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[2]The arbitrator is well aware that the Company claims the proper cause is determined by the "last chance agreement."

proper remedy by the arbitrator.[3] However, back pay without reinstatement is a manifestly impermissible compromise under such Agreement as the one here in question. If there is a due process violation which vitiates a discharge under the contract as e.g., when the violation prejudices the employee's defense, the discharge must be set aside. If such violation does not vitiate the discharge under the Agreement and in fact, the discharge should be upheld if the discharge was otherwise proper. If the discharge was for just cause the Company had a right to discharge the employee under Article 13 of the Agreement. If the discharge was not for just cause, the only possible interpretation of Article 13 is that the Company may not discharge him, and if it does, the employee must be reinstated. For all these reasons the arbitrator may not follow

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[3]Reinstatement without back pay is a distinct remedy under the rationale that discharge is a qualitatively different penalty than even a long suspension, and that an employee who committed a serious offense should not profit from it.

the Company suggestion and fashion a compromise based on a "mismatch" between the Company and the Grievant. The arbitrator does not, of course, suggest that a specific contract may not call for back pay without reinstatement. It is so, for instance, in contracts which include so called "work with dignity provisions," i.e. right to work between discharge and the receipt of arbitration award. But imposing a penalty on the Company,[4] payable to the discharged employee rather than to the Union is, in this arbitrator's view, a concept without foundation. In any event, the arbitrator finds the opinions in re Kaiser Steel (78 LA 185), in re Chromalloy American Corp. (93 LA 828), and in re Lancaster Electro Plating (93 LA 203) unpersuasive on their facts, and of no support for a compromise

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[4]In re Kaiser Steel Corp., 78 LA 185 cited by the Company the arbitrator specifically held that the Grievant's earnings may not be deducted from his award.

solution in this case.[5]

5. Concerning last chance agreements it has been said that "[t]he key to such agreements is the provision that failure to comply will immediately result in termination. These agreements are regularly signed by the three parties involved - the company the union and the individual" (in re BASF Corporation 90 LA 460, 462, a William Daniel award). Arbitrator Heinsz, addressing the issue of waiver in last chance agreements, held: "In order for such waivers to be effective, the Company must prove the validity of the agreement .... For a waiver to be proper the following conditions must be met: (1) the waiver must be specific, (2) the employee must have full knowledge as to the rights he is giving up, (3) the employee must receive a substantial benefit in return, and (4) the Union

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[5]See also Elkouri and Elkouri, How Arbitration Works, 4th ed., 673, 674 (reference to an "unusual approach"), and 688 et seq. It should be noted that this arbitrator failed to find a single case which stands for the proposition that a sum of money may be awarded in lieu of reinstatement.

must participate and consent..." (in re Atlantic Richfield Co. 81 LA 1193, 1195, 1196). Of course, the Union is the exclusive bargaining agent of the Grievant, and as such has authority to settle any existing grievance with or without the Grievant's consent, as long as it acts in good faith, and its action is neither arbitrary nor discriminatory. For reasons which will be apparent below, the arbitrator finds that the Union acted in good faith, and that its actions on September 6, 1988 were eminently reasonable. Beyond that it is not necessary to discuss the post-September 6 rights and obligations of the Parties and the Grievant under the September 6 document. The document states that "any such offense of a similar and/or like nature in violations of Category A Rules and Regulations will warrant your termination of employment...." (emphasis added). Thus, what that document says with respect to this Grievant's situation is nothing else than a restatement of a right the Company had under the Agreement and the progres-

sive discipline scheme. Having disposed of several general and preliminary issues above, the arbitrator will now turn to the individual arbitrations.

6. Arbitrations Numbers 1, 2 and 6. The discipline in all these cases was given essentially for poor work performance. In arbitrations 1 and 6 Supervisors in fact checked or rechecked the Grievant's route. The Union is correct in emphasizing that productivity must be measured against an established standard. But there is more in these arbitrations than just a supervisory conclusion that the Grievant took too many hours to complete his assignment. Refusal to submit part of his itinerary in arbitration No. 1 with the justification that it was his personal property and a failure to elaborate on his route when questioned after the conclusion of his run is in part unexplainable and in part indirectly supportive of the Supervisors judgment. While the early morning prob lems in arbitration No. 2 might not have hap-

pened had the Grievant been given a pallet jack, it is impossible to accept that a driver who has worked four years from the same workplace, part of it as an Extra-man could assert his lack of familiarity with that workplace and with the delivery trucks as a meaningful justification of his conduct that morning. Plain common sense dictates the conclusion that a Coca Cola employee must have enough initiative to remove a Pepsi Cola display without making it an issue with the customer and with his employer. General behavior of the Grievant on other occasions supported various characterizations by the Supervisors. At the same time, the arbitrator concluded that the Union testimony did little to rebut the Company evidence. The testimony on the delivery to Children's Hospital, to Monsanto, to various customers on December 6, 1988 was indicative of the general tenor of the Union testimony on the Grievant's performance in these cases. Mr. Krueger was not an impressive witness; except for the term "hit list," his testimony, even on

its face, did not suggest any ulterior motivation of the Company. Mr. Ted Boss, at the conclusion of the hearing, during the general testimony testified that the Company was strict but fair in administering discipline. At least at the time of discipline in arbitrations Nos. 1 and 2 there is no evidence of any effort by the Company to single out the Grievant for discriminatory treatment of any kind. After December 6, 1988 the Parties were discussing the issues involving this Grievant. Counsel participated in these negotiations. Under these circumstances failure to give notice may not be claimed. Grievances in arbitrations nos. 1, 2 and 6 are denied.

7. Arbitration No. 3. The testimony of Christ Stratmeyer lacks specificity as to the dates and circumstances to evaluate Mr. Stratmeyer's claim of fear. Except for that allegation, there is no substance in this arbitration. The Company failed to prove this case, and the grievance in arbitration No. 3 must be sustained.

8. Arbitration No. 4. The Grievant is sufficiently educated, and very much mindful of his own rights, so as to be held to the common sense standards of behavior in the contemporary United States. The testimony of Beverly Ellis is credited. The Grievant must have known that the behavior which she described (supra) was unacceptable, even if no harm was intended. The arbitrator finds that the Company proved violation of rule B-6, and the grievance in arbitration No. 4 must be denied.

9. Arbitration No. 5. It should be first said that disqualification from the Extra-man position and the award of a regular route were of an unmistakable benefit to the Grievant. After all, even during the arbitration hearings he sought to justify some of his actions (e.g. those involved in arbitration No. 2) by his lack of familiarity with different trucks and with different routes. Mr. Becker admitted that having a regular route was advantageous to the Grievant. The complaints from Pronto Enter-

prises and Walmart were serious. The situation reached the fifth step of corrective discipline, pending the outcome of possible arbitrations which eventually became arbitrations 1 and 2 herein. All this evidences the reasonableness of the September 6 solution from what must have been the Union point of view. The December 6 document was also signed by the Stewards on the reverse side. The text of the document is unmistakable; it is an agreement between the Company and the Union on resolution of the situation which prompted the September 6 meeting. The following grievances, at least partly drafted by the Grievant, do not call into question the consensual nature of the resolution. On the basis of the September 6, 1988 agreement, as well as on the basis on the underlying facts the grievance in arbitration No. 5 is denied. However, the Grievant suffered a loss of pay for eleven days. Both Parties agreed that the eleventh day deduction was an error. Consequently, the Grievant shall receive one day's pay.

10. Arbitration No. 7. As mentioned above, the gist of the Company argument was that the Grievant had not checked in at the time of the hot shot assignment. But even Mr. Hinton, who made the decision, testified that checking in was not the criterion. Mr. Hinton testified that the assignment is given to employees in the room. Section 8 of Article 26 supports this proposition. However, the Grievant was entering the room as Morris was leaving. Mr. Morris' testimony and the testimony of Ted Boss as to the practice is credited and the grievance must be sustained.

11. Arbitration No. 8. Ted Boss agreed with the Company that afternoon hearings are conducted off the clock. It was precisely that knowledge that made him wonder about the Grievant's assertion that he was told to remain on the clock, and that made him inquire with Supervisor Pratt. That is a rationale that supports the probability of good recall of the incident by Mr. Boss even though months have passed. It

was said above that the arbitrator found Mr. Boss an impressive and credible witness. His testimony is credited and the grievance in arbitration No. 8 is sustained.

12. Arbitration Nos. 10 and 11. The DOT form was filled in on April 14, 1989. It is uncontested that the Grievant advised Mr. Ryan before the April 19, 1989 meeting that he forgot to clock out. None of these events was subject to the April 19 meeting. They were not mentioned at the April 19 meeting. Nothing was testified about Ryan's reaction to what the Grievant told him about forgetting to clock out. No reaction is assumed. The meeting ended with a suspension which the Company judged improper and unjustified. It was after this suspension that Ryan, who attended the meeting, came up with the three infractions: Ryan observed the trash in the Grievant's truck, and told Roustio about the DOT form and failure to clock out. At the same time, the Stewards were not brought in in the morning to observe the condition of the

truck. Furthermore, the Company did not know even at the arbitration hearing the facts about the improper truck number on the DOT form, except that such truck number did not exist. On April 19, 21, etc. the Company was not interested in what happened. The Company made an assumption, a wrong one as it turned out, and as this arbitrator specifically finds was only interested in discharging the Grievant. It is at this juncture that it must be said that there is no doubt in the arbitrator's mind that the Company decided to discharge the Grievant for the three alleged infractions. As is well known to the Parties, there were originally three disciplinary notices prepared by Ryan, which did not include discharge as a penalty. The Company witnesses testified that the decision to discharge was made after discovery of the three infractions. Thereafter, for whatever reasons, the decision was made to separate the DOT form infraction from others. The arbitrator views this decision as contrived, without any basis in

facts. The arbitrator finds as a fact that the Grievant was discharged for the three alleged infractions. In other words, the arbitrator finds as a fact that the three alleged infractions represented - cumulatively - the triggering event for discharge in this arbitration. There is no support for the proposition, which in fact was not explicitly made, that the Grievant would have been discharged for any one of the alleged infractions had it been the only infraction. Furthermore, it must be concluded that none of the three infractions involves the kind of inept performance or disinterest in furthering the Company's business as was the case in arbitrations Nos. 1, 2, 5 and 6.

13. Company Rule A-18 requires more than an inadvertent transposition of figures to be invoked. Furthermore, there was no explanation why the dispatcher or supervisors did not fill in the truck number in the hot shot paperwork. The Company did not know what happened until the arbitrator directed it to check the facts. The

arbitrator finds no infraction of rule A-18 with respect to the DOT form. The issue of the trash in the cab of the Grievant's truck as a violation of A-1 represents a judgmental matter. Ryan testified that he had seen trucks in such a disarray before. The Company let another driver drive the truck before it was shown to the Stewards. The Company concluded that there was an A-1 violation at the time when it was searching for ways to discharge this Grievant. The element of dispassionate judgment is missing in this situation. The arbitrator finds that the Company failed to prove that the Grievant violated rule A-1. Failure to clock out is a violation of rule A-10. However, it was the Grievant himself who alerted Mr. Ryan to his omission the morning after it happened. The Grievant obviously did not intend to gain anything by failing to clock out. There is no known reaction of Mr. Ryan to the Grievant's admission before the April 19 meeting. Under

these circumstances, the arbitrator considers the violation of rule A-10 here in question to be a de minimis violation.

14. The Company discharged the Grievant for three violations, brought to Mr. Roustio's attention at the same time, and in the atmosphere marked by improper and unjustified suspension of the Grievant. The evidence dictates the conclusion that all three alleged infractions constituted the prohibited triggering event of this discharge. All three alleged rule violations would have been of essentially similar degree of gravity had they occurred. The evidence dictates the conclusion that the Company failed to prove violations of Rules A-1 and A-18, and that the violation of rule A-10 was a de minimis violation. Consequently, the alleged triple violation did not occur. Because it did not occur, there was no factual or contractual basis for any discipline. Consequently, the grievances in arbitrations No. 10 and 11 must be

sustained, the Grievant must be reinstated and made whole for all his losses from the effective date of the discharge.

15. As far as the Union's view of the post-aware remedial power of the arbitrator is concerned, it must be first said that the arbitrator believes that he is functus officio as of the date of issue of the award, and does not have authority to retain jurisdiction. It should be further observed that this award must be complied with in good faith. However, the arbitrator wishes to state that while the Company should assist the Grievant to familiarize himself with any new route, it does not have any obligation to teach him how to drive trucks. It should be ultimately observed that the problems of this protracted series of arbitrations evidence the value of prompt resolution of individual disputes. However, the arbitrator does not believe he has the authority to order expedited arbitration of any possible future disputes involving this Grievant.

AWARD

Grievances in arbitrations Nos. 1, 2, 4 and 6 are denied.

Grievances in arbitration No. 5 are denied, except that the Grievant shall be made whole for the eleventh day of loss of pay.

Grievances in arbitrations Nos. 3, 7 and 8 are sustained.

Grievances in arbitrations Nos. 10 and 11 are sustained. The Grievant shall be reinstated and made whole. Any earnings or compensations he received during his separation from the Company since the effective date of his discharge shall be subtracted from his back pay.

Respectfully submitted,

/s/ Josef Rohlik
Josef Rohlik, arbitrator

In University City, Missouri
September 17, 1990

APPENDIX J

DISCIPLINARY ACTION NOTICE

TO: Ken Youngerman Date: September 6, 1988

FROM: Jerry Coy

TYPE OF ACTION:

_____ DOCUMENTED COUNSELING WARNING

_____ WRITTEN WARNING

__X__ __10__ DAY SUSPENSION

EFFECTIVE: 8-22-88

RETURN TO WORK: 9-06-88

IMMEDIATE SUSPENSION, WITHOUT COMPENSATION, PENDING INVESTIGATION FOR TERMINATION: _____

_____

DATE OF OCCURRENCE: Week of 8/15/88 thru and including 8/19/88

SPECIFIC INFRACTIONS: (List rule(s) violated. Refer to Rules & Regulations Policy, dated 1-18-88. Explain as specifically and comprehensively as possible; include dates, times, place and persons involved.)

Pursuant to the Union's recommendation on a one time non-precedent setting basis the Company will agree to the following in this situation only; A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. This ten (10) day suspension is without compensa-

tion. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section #1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that

(con't over)

You are reminded that further violations will result in a more severe penalty and/or DISCHARGE as outlined in the Rules & Regulations Policy. I have read and understand the above Disciplinary Action Notification.

_____	/s/ Richard Roustio
Employee	Supervisor
/s/John G. Becker, Jr.	/s/ Jerry W. Coy
Shop Steward	Manager

/s/ Gary Tinsley

cc: Shop Steward
Business Agent
Jerry Graves
Department Head
Curt Wacker
Personnel File
Human Resources File

Ken Youngerman present
9/6/88 6:50 p.m.
refused to sign
/s/ Jerry W. Coy

the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next such occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis.

/s/ Jerry W. Coy
Distribution Mgr.

/s/ G.B. Jr.

/s/ G.T. Tinsley

AGREEMENT

BETWEEN

COCA-COLA BOTTLING COMPANY OF ST. LOUIS
A DIVISION OF JOHNSTON COCA-COLA
BOTTLING GROUP, INC.

and

TEAMSTERS LOCAL UNION NO. 688
AFFILIATED WITH INTERNATIONAL BROTHEROOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

June 1, 1987 through May 31, 1990

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Exhibit "A" 49

AGREEMENT

This AGREEMENT, dated this 1st day of June, 1987, by and between COCA-COLA BOTTLING COMPANY OF ST. LOUIS, a Division of Johnston Coca-Cola Bottling Group, Inc., or its successors, hereafter called the "EMPLOYER", party of the First Part and TEAMSTERS LOCAL NO. 688, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or its successors, party of the Second Part, hereafter referred to as the "UNION", is for the purpose of establishing rates of pay, wages, hours of work and conditions of employment to be observed between the parties herein, WITNESSETH:

ARTICLE 1. RECOGNITION

Section 1. The Employer agrees to recognize and does hereby recognize the Union, its agents, representatives or successors as the exclusive bargaining agent for and on behalf of the employees as hereinafter defined.

Section 2. The term "employee" as used in the Agreement shall include:

a. All the employees classified as Delivery Personnel such as Conventional Route Drivers, Pre-Mix/Post-Mix Route Drives, Merchandisers, Extra Drivers, excluding Account Managers (Sales Functions).

b. Forklift Operators and Miscellaneous Warehousemen working in distribution warehouses other than those locations certified by the N.L.R.B. in Case No. 14-RM-638.

c. Advertising Men, Special Events Men, Cooler Repair Servicemen, Cooler Delivery Men and Cooler Delivery Helpers servicing areas not serviced by members of Local 303 and as outlined in an agreement between the Employer, Union and Local 303 dated August 6, 1973.

Section 3. The Employer will neither negotiate nor make Collective Bargaining Agreements for any of its employees in the Bargaining Unit covered hereby unless it be through a duly authorized representative of the Union.

Section 4. The Employer agrees that it will not sponsor or promote financially or otherwise, any group or labor organization for the purpose of undermining the Union; nor will it interfere with, restrain, coerce or discriminate against any of its employees in connection with their membership in the Union.

ARTICLE 2. REPRESENTATION

In dealing with the Employer the Union shall be represented by employee Shop Stewards who shall be selected in any manner determined by the Union on the basis of one (1) for each twenty-five (25) employees, or major fraction thereof, with a minimum of one (1) Shop Steward for each department, and one (1) Shop Steward for each outlying distribution warehouse.

ARTILCE 3. STEWARDS

The Employer recognizes the right of the Local Union to designate Stewards and alternates from the Employer's seniority list. The authority of Stewards and alternates so desingated by the Local Union shall be limited to, and shall not exceed the following duties and activities.

a. The investigation and presentation of grievaces with his Employer or the desinated Employer representative in accordance with the provision of the Collective Bargaining Agreement;

b. The collection of dues when authorized by appropriate Local Union action;

c. The transmission of such messages and information, which originate with, and are authorized by the Local Union or its officers, provided such messages and information:

(i) have been reduced to writing; or

(ii) if not reduced to writing, are of a routine nature and do not involve work stoppages, slowdowns, refusal to handle goods, or any other interference with the Employer's business.

Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of Stewards and their alternates, and shall not hold the Union liable for any unauthorized acts.

ARTICLE 4. CHECKOFF

Section 1. It is understood and agreed between the Employer and the Union that the

Employer will deduct any back unpaid Union dues and initiation fees owed the Union (provided such indebtedness for dues or initiation fees was incurred during employement with the Employer) as well as current monthly Union dues and initiation fees and/or other uniform assessments from the paycheck of employees who have signed proper legal autorizations for such deductions and who are covered by this Agreement on the last payday of the month preceding the current month for which current Union dues and initiation fees are due the Union. The Employer further agrees to remit to the Secretary - Treasurer of the Union all Union dues, initiation fees and/or uniform assessments so deducted from the employees' paychecks immediately.

Section 2. The Employer will recognize any other authorization for deductions from wages, if in compliance with state law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to. No such authorization shall be

recognized if in violation of state or federal law. No deduction shall be made which is prohibited by applicable law.

ARTICLE 5. UNION SECURITY CLAUSE

It is understood and agreed by and between the parties hereto that as a condition of continued employment, all persons who are hereafter employed by the Employer in the unit which is the subject of this Agreement shall become members of the Union not later than the thirty-first (31st) day following the beginning of their employment or the execution date of this Agreement, whichever is the later; that the continued employment by the Employer in said unit of persons who are already members in good standing of the Union shall be conditioned upon those persons continuing their payment of the periodic dues of the Union; and that the continued employment of persons who were in the employ of the Employer prior to the date of this Agreement and who are not now members of the Union, shall be conditioned upon those persons

becoming members of the Union not later than the thirty-first (31st) day following the execution date of this Agreement. The failure of any person to become a member of the Union at such required times shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union membership was available to such person on the same terms and conditions generally available to other members, to forthwith discharge such person. Further, the failure of any person to maintain his Union membership in good standing as required herein, shall upon written notice to the Employer by the Union, to such effect, obligate the Company to discharge such person.

ARTICLE 6. SENIORITY

Section 1. In all cases of layoffs and recalls, the principle of seniority shall prevail; that is, the last one hired shall be the first one laid off; provided, however, that the employees retained or recalled be immediate

ly qualified*/ to do the work involved.

In the event of the elimination of a route or position, the junior employee in the affected territory or classification shall have the right to exercise his seniority to bump the junior employee in another territory or classification, provided he is immediately qualified*/ to perform the available work. Employees subsequently bumped may exercise their seniority to bump a junior employee in another territory or classification, provided they are immediately qualified*/ to perform the available work. Such individual bump must be completed within three (3) work days. Job classifications are Bulk Delivery Drivers, Conventional Route Drivers, Merchandisers, Full Service Drivers, Pre-Mix/Post-Mix Route Drivers, and Extra Drivers.

Section 2. Where Employer operates an outlying warehouse or branch for the distribu-

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*/ Immediately qualified means an employee will be given three (3) days to demonstrate his ability to perform.

tion of its products, seniority shall be applied on a company wide basis to permit bumping or bidding by all employees in the locations covered by this Agreement for any openings, at any location covered hereby, and to permit displacement by employees of a location covered hereby, according to seniority as set forth in Sections 1 and 2 of this Article, in the event of any reduction of the work force at any such location. In the day-to-day administration of all such locations, each location shall be considered a separate, self-contained unit.

Section 3. A list of employees dated according to seniority shall be furnished to the Union and the Shop Stewards quarterly.

Section 4. Absence from employment due to any reason (except Union Leave per Article 18 and Workers' Compensation) for a period in excess of twenty-four (24) months shall cause a break in seniority.

Section 5. No employee may be transferred from another division of the Employer not cov-

ered by this Agreement into the Division covered by this Agreement without losing his or her seniority.

Section 6. When the masculine pronoun appears in the Agreement, it shall be deemed to refer to both male and female employees.

Section 7. When an employee is recalled from layoff to a position for which he has the ability to perform he must accept the work and return immediately, or he will be deemed to have quit and his seniority will end. Such employee will be contacted telephonically, if possible, and will have three (3) calander days from such contact to report to work. In the event no telephone contact is made, contact will be by registered mail at the last employee furnished address. Such employee has three (3) calander days from receipt to report to work.

ARTICLE 7. JOB VACANCIES

Section 1. In the event an opening occurs in a regular classification or route, Employer agrees to post such opening for a period of

three (3) working days. Such opening will be awarded to the senior employee provided he meets the reasonable minimum qualifications as determined by the Employer.

Section 2. Successful bidders will have ten (10) working days as a trial and training period during which they must demonstrate the ability to perform the work. If an employee is disqualified by the Employer during this period, he shall return to his former position.

Section 3. If an employee bids on an open position, he will receive the rate of pay for that position.

Section 4. An employee bidding for a route within his current classification will be presumed to be qualified and will not be required to serve a trial period.

Section 5. A successful bidder may not bid on another opening in the same classification for a period of six (6) months following the previous bid. This provision will be effective on and after the Master Bid.

Section 6. Employees who are off work between two (2) weeks and twelve (12) months, unless known earlier, shall have their positions posted for a temporary bid. After twelve (12) months, or when it is clear that the employee will not return within the twelve (12) month period, such position will be posted for permanent bid. Temporary bids shall be available to Extra Drivers, whereas permanent bids shall not be limited. If an Extra Driver is on vacation at the time of the bid, he will be permitted to bid on the route when he returns to work.

An employee returning within the twelve (12) month period shall be returned to his former position. An employee who returns after the twelve (12) month period shall have his rights determined under Article 6, Section 1.

ARTICLE 8. GRIEVANCE PROCEDURE

Should differences arise between the Employer and the Union or any employee of the Employer as to the interpretation or application of the provisions of this Agreement and attach-

ments hereto, there shall be no suspension of work and such differences shall be settled in the following manner:

Section 1. Within five (5) working days after the occurance of the event giving rise to a grievance or within five (5) working days after knowledge of the grievance, the aggrieved employee or employees shall first take the matter up with the Shop Steward who in turn will take the grievance up with the Supervisor in charge of the department. Employees shall have the Shop Steward present on any grievances. If a satisfactory settlement is not affected within one (1) working day, employees shall submit such grievance to the Employer in writing, which shall review with the Union Representative the alleged grievances and offer a decision within five (5) working days after receipt of same.

Section 2. If the grievance cannot be settled under Section 1 of this Article, it shall be submitted to a two (2) man Adjustment Board within five (5) working days. One member

of the Shop Adjustment Board shall be selected by the Secretary - Treasurer of the Union and the other member selected by the Employer. All greivances submitted to the above mentioned board must be settled within five (5) working days from the date of submission.

Section 3. If a grievance cannot be settled by the Two (2) Man Adjustment Board under Section 2 of this Article, and the Union desires to appeal the grievance to arbitration, written notice of the Union's desire to arbitrate shall be given to the Employer within ten (10) working days of the date of the Adjustment Board meeting. The Employer and Union may undertake to choose an impartial arbitrator by mutual agreement from either a Federal Mediation and Conciliation Service panel, or from an American Arbitration Association panel. The parties may by mutual agreement attempt to expedite the selection of an arbitrator, hearing date and request a timely, written opinion in a discharge situation. If the Employer and the Union are unable

to agree on an arbitrator within ten (10) working days from the date the Union gave written notice of the desire to arbitrate, the parties shall send a joint letter to the Federal Mediation and Conciliation Service or American Arbitration Association requesting a list of seven (7) arbitrators. Either party may reject one (1) entire list of arbitrators, and in such event an additional list of seven (7) arbitrators shall be requested from the Federal Mediation and Conciliation Service or the American Arbitration Association, upon receipt of which list the selection will be made. First the Union and then the Employer shall strike two (2) names therefrom, then each party shall strike one (1) additional name, and the arbitrator whose name is not striken shall be deemed selected. Such arbitrator shall be notified of his selection by a joint letter requesting him to set a time and a place for hearing subject to the availability of the Employer and Union Representatives. The award of the arbitrator

shall be final and the binding upon the parties. Any expense incurred by such impartial arbitrator in connection with his services shall be paid for by the Employer and Union equally. The arbitrator shall have only the power and authority to interpret and apply the provisions of this Agreement and any attachments thereto to the grievance presented and shall have no authority to alter, amend, modify, nullify, ignore or add to or subtract from the provisions of such Agreement except as otherwise provided in Article 15.

Section 4. The time limits set forth herein may be extended by mutual agreement.

Section 5. The Grievant and his Shop Steward shall meet with the Employer on grievances as they occur.

ARTICLE 9. SAFTEY AND HEALTH

The Employer shall continue to make reasonable provisions for the safety and health of its employees during the hours of employment. All trucks shall be equipped with heaters and

defrosters, signal lights, and rear view mirrors on both sides of trucks. All new equipment shall also be equipped with power steering and power brakes. All equipment shall be equipped to allow the employees to safely enter and exit the cab.

Employees will not be required to deliver to unsafe dealers. The determination as to whether or not a dealer is unsafe shall be made by mutual agreement between the Employer and the Union.

All trucks of the Employer will be maintained so as not to impair the safety of the employee operating the truck. Employees shall be responsible for complying with the Employer's truck maintenance reports. If a truck is unsafe to operate due to mechanical failure or prior written notice of malfunction without repair, then by mutual agreement, the truck may not be sent out until the malfunction or mechanical repair is completed.

ARTICLE 10. UNIFORMS AND EQUIPMENT

Section 1. The Employer agrees to furnish

all employees uniforms of the type designated by management. The Employer agrees to furnish work gloves to all employees on an exchange basis.

Section 2. The Employer will, at its expense, furnish to all delivery employees, two-wheeled pnuematic tired hand trucks and replacement thereof after normal wear and tear, upon return of the old equipment. The Employer will provide a place in which the employees must secure the hand trucks at the completion of the work day. The employees will be held fully responsible to the Employer for both hand trucks to the extent of their current depreciated value.

ARTICLE 11. LIE DETECTION

The Employer agrees that under no circumstances shall any employee be asked to submit to a polygraph or similar test.

ARTICLE 12. WORK ASSIGNMENT

The Employer agrees not to direct or require persons other than the employees in the Bargaining Unit herein to perform work which is recognized as the work of the employees in said

unit, except in emergencies, after the Company has made every effort to recall any laid off employess qualified to perform said work, and after the Employer has made every reasonable effort to have Bargaining Unit employees perform the work.

ARTICLE 13. DISCHARGE AND SUSPENSION

The Employer may discharge or suspend an employee for just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of a related nature against such employee except that an employee may be immediately discharged for dishonesty, use of intoxicating beverages during working hours, use or possession of controlled substances other than perscription drugs, fighting, willful negligence resulting in damage to person or property, disobeying a direct legal work order, or incidents of a more serious nature, and failure to report to work for three (3) days without calling in. As used in this paragraph, notices of discipline of a "related nature" fall

into three (3) catagories: work performance, misconduct, or absenteeism/tardiness.

Notice of written warning and all disciplinary actions shall be given to the employee, and notice of suspension and discharge shall be sent by certified mail to the employee at his last known address, with a copy of all disciplinary action to the Local Union and Shop Steward.

ARTICLE 14. EMPLOYEE DISQUALIFICATION

Section 1. Employer Disqualification - Any employee disqualified by Employer action will be permitted to bump the most junior employee in a classification where his seniority carries him provided he is immediately qualified* to perform the work.

The employee will accept the rate of pay of the classification he bumps into.

The disqualified employee may exercise his seniority to bid on any opening that occurs, but will not be allowed to bump on openings within the classification he was disqualified from for

a period of fifteen (15) months from the date of disqualification. Such employee will have a ten (10) day training period.

Section 1. Medical Disqualification - If an employee is disqualified for medical reasons (verified), the employee may be assigned to a classification, provided he has the seniority to displace the most junior employee within the classification and the ability to perform the available work. It is further understood that the employee must displace the most junior employee in that classification. Upon returning to his prior classification, he shall receive the applicable rate. An employee disqualified for medical reasons must have a doctor's release and be able to perform the available work before being returned to his position.

An employee who is disqualified for medical reasons shall receive the rate of pay of the position he is assigned to.

ARTICLE 15. INVALIDATION CLAUSE

If any of the terms and conditions of this Agreement are in violation of any State or

Federal Law, Court Decision, or Decree, then to the extent of any violation, this Agreement shall be null and void and subject to renegotiation. If any portion of this Agreement is declared illegal, it shall not in any way affect the remaining provisions of the Agreement.

In the event the parties are unable to agree to a mutually satisfactory replacement, then the parties shall submit their final positions to an impartial arbitrator who shall select from the parties final position a mutually satisfactory replacement.

ARTICLE 16. HIRING CLAUSE

The parties recognize the fact to be that the Union's knowledge and experience within the industry, together with the sources of competent manpower available to it, can be of assistance to the Employer in recruiting needed employees. It is therefore agreed that the Employer shall notify the Union whenever employees are to be hired and shall afford the Union an opportunity to recommend job applicants. Similar notifica-

tions may be given to other sources of employment. The Employer futher agrees to give such applicants due consideration, consistent with the provisions of the National Labor Relations Act, as amended.

ARTICLE 17. PROBATIONARY EMPLOYEES

Section 1. Employees shall be on probation with the Employer during the first sixty (60) working days. During the first thirty (30) day period they may be terminated for any reason, without recourse by the employee or the Union. The Employer may discharge such employee during the remainder of the probationary period and such probationary employee may not grieve the discharge if for work performance or misconduct.

Section 2. New employees will be assigned to the Extra Driver classification and are not eligible to bid on any other classification for a period not to exceed six (6) months after date of hire. Such employees must be trained in all jobs and thereafter will be presumed to be immediately qualified* for all job classifications.

ARTICLE 18. LEAVE OF ABSENCE

Section 1. Union Leave - Any employee elected or appointed as an official of the Union or delegate to any Labor activity, necessitating a leave of absence, shall be granted a leave of absence without pay and be guaranteed reemployment at the end of such period, with the same seniority including vacation rights as though he had been continuously employed.

Section 2. Veterans reemployment rights shall be in accordance with applicable law.

Section 3. Personal Leave - Personal leaves of absence may be granted without loss of seniority, but must be approved by the Employer. All such leaves shall be in writing.

Section 4. Leave for Management Job - Leave of absence from the Bargaining Unit, for not to exceed sixty (60) days, may be granted to employees so that they may accept management jobs, and may thereafter and before the expiration of said sixty (60) day period, return to the Bargaining Unit without loss of seniority.

Employees who elect to accept positions as Account Managers filling the initial complement of approximately thirty-three (33) such positions shall be entitled to return to the Bargaining Unit without loss of seniority for a period up to three (3) months following the date of the Master Bid.

Section 3. Leave for Special Job During Disability - In the event of disability, leave of absence from the Bargaining Unit may be granted to employees so that they may accept special jobs for the Employer outside of the Bargaining Unit, and may thereafter return to the Bargaining Unit without loss of seniority.

ARTICLE 19. PICKET LINE

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a lawful primary labor dispute, or refuses to go through or work behind any lawful primary picket line, including the lawful primary picket line

of the Union party to this Agreement, and including lawful primary picket lines at the Employer's places of business.

ARTICE 20. STRUCK GOODS

It shall not be a violation of this Agreement and it shall not be cause for discharge or displinary action if any employee refuses to perform any service which his Employer undertakes to perform as an ally of any Employer or person whose employees are involved in a strike or lockout and which service, but for such strike or lockout, would be performed by the employee of the Employer or person who has the strike or lockout.

ARTICLE 21. UNAUTHORIZED ACTIVITY CLAUSE

Section 1. The Union will not cause, permit, or authorize its members to strike, sit down, walk out, slow down, or engage in any work stoppage or limitation on operations during the term of this Agreement. The Employer agrees that there shall be no lockout under the same conditions.

Section 2. It is understood and agreed that the Union shall have no financial liability for acts of its members or agents which are unauthorized and which the Union cannot control. It is agreed, however, that in the event of such unauthorized action, such as a strike, sit down, walk out, slow down, or any limitation on the operation, etc. the Union shall, upon receiving notice thereof, urge its members to return to work and as soon as possible address a letter to the Employer notifying the Employer that the action of the Union members or agents is unauthorized.

Section 3. The Employer shall have the sole and complete right to immediately discharge any employee participating in any such unauthorized activity. Any employee so discharged shall have recourse through the grievance procedure.

ARTICLE 22. ENTIRE AGREEMENT

This Agreement constitutes the sole and entire existing Agreement between the parties and expresses all the obligations of and the

restrictions imposed upon the Employer and the Union. All prior agreements and understandings, oral or written, expressed or implied, between the Employer and the Union or the Employer and any of the covered employees are either superseded by specific sections of this Agreement, or, in the absence of such coverage, specifically withdrawn. This Agreement shall be the sole source of any and all rights or claims which may be asserted under any other provision of this Agreement or otherwise.

It is agreed that the provisions of this section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of discovery of the error.

ARTICLE 23. MANAGEMENT RIGHTS

The Employer has, retains, and shall continue to possess and exercise each and every management right, right to function, privilege and authority which it had prior to the certifi-

cation of the Union except, and only except, as specifically limited, relinquished, modified, or restricted by this Agreement. Illustrative, but not all inclusive of the rights of management retained are the right to manage the company; to direct the work force, and to make and enforce rules of conduct; to subcontract; to change hours and days of work; to make and change work duties and assignments; to determine the quality and quantity of productivity required; to change or adjust the hours and numbers of shifts and assignments thereto; to hire employees; to classify, promote, discipline, demote, and discharge employees; to lay off and recall employees; to select and make technological state of the art changes and processes, tools, equipment, and facilities; to determine the number of employees to be employed in each department, shift, and classification; to determine the number of employees to be employed in any particular work function or assignment; to decide the methods, equipment, processes, and

means of distribution; to determine the utilization of labor saving devices which may result in the reduction of the work force; and to establish new departments and job classifications. Subject to the terms of this Agreement, rights not specifically set forth in this Agreement upon which the parties negotiated or had the opportunity to negotiate, whether or not such rights have been exercised by the Employer in the past, remain with the Employer.

ARTICLE 24. MISCELLANEOUS NON-COST PROVISIONS

Section 1. The Employer agrees to furnish bulletin boards. The Union shall have the right to post Union notices or notice of social gathering on the bulletin boards furnished by the Employer for the exclusive use of the Union.

Section 2. An authorized representative of the Union shall have access at all times during working hours to the Employer's premises for the purpose of enforcing the contract upon notifying the Employer.

Section 3. The Employer and the Union

agree that they will not discriminate against any individual with respect to terms and conditions of employment because of race, color, religion, age, sex, veteran status, handicap, national origin, or union affiliation.

Section 4. No employee covered by this Agreement shall be required to wash vehicles, gas trucks, change tires, put on chains, oil trucks, perform hand truck repairs, or air tires. Other emergency care of vehicles shall be the responsibility of the drivers.

Section 5. In the event of any loss or damage to any equipment entrusted to the employee's care, the employee shall be required to make a full report in writing of all the circumstances surrounding the loss or damage including the names and addresses of witnesses, if any. Employees shall not be charged with such loss or damages, unless due to his negligence. This Section is not to be construed as applying to charging employees for damage to equipment, except to the extent provided in Article 10, Section 2.

Section 6. It is agreed that the Employer will not require employees to work overtime on any regular or special meeting night of the Union, provided such members are limited to one (1) in any one (1) month, except by mutual agreement between the Employer and the Union.

Section 7. The Employer will furnish a place for the employees to report to in the morning which will be heated and have the necessary toilet facilities.

Section 8. All Delivery personnel assigned to a route will be held responsible and accountable for all merchandise assigned to his route truck.

The parties agree that if the Employer can develop an inventory system that is agreeable to the Union, the Full Service personnel will be held responsible and accountable for the inventory (consisting of cash and products) of each machine assigned to his route.

The Delivery personnel will pay all shortage on the Friday following the week that they occur.

Section 9. Extra Drivers shall be on a single list and bid on any classification. They will bid, by seniority, for the route of a Delivery person on vacation for the duration of the vacation. Extra drivers will bid by seniority daily for any opening and will maintain that bid for the remainder of the week.

When the Employer is notified that an illness will be for a period of longer than two (2) weeks, the route will be bid for the following Monday by the Extra Driver regardless if they are on a vacation bid. This bid will be for the duration of the illness. If an Extra Driver is on vacation at the time of the bid, he will be permitted to bid on the route when he returns to work.

Section 10. Training Program.1/

Section 11. The routes at Scott Field which require the below special servicing by the assigned Route personnel:

1/ At or about the commencement of the Advance Sales System the Training Program will be presented to the Union.

a. In the event of a new starting time employees on this bid route will be permitted to bump a junior employee in accordance with Article 6, Seniority, Section 1.

b. If the employees assigned to the route desire to bump to another position, the route will be posted showing the new starting time.

c. Extra Drivers bidding on this route for vacation, sick leave, etc. must accept the starting time of this route.

Section 12. Employee Appearance - The Employer expects all employees to be neat in appearance. A neat appearance lends dignity to each of us as well as the company as a whole. To aid us in meeting our objectives, we have adopted the following grooming standards for all of us who meet the public while performing our normal job duties:

a. The uniforms that are furnished by the Employer must be worn at all times while at work or on the Employer's premises and are to be clean and neat in appearance. Shirts will be tucked into the trousers and buttoned.

b. Hair should be styled, cut or worn in such a manner that it does not cover any part of the eyes, shall not fall below the ear, or cover the shirt collar in the back during any part of the day.

c. Sideburns, mustaches, goatees, or beards shall be well trimmed and neat in appearance.

d. Except for mustaches, goatees, or beards, as described above, employees shall be clean shaven.

e. Tee shirts, sweaters or other under garments that are worn with our uniforms and are visible must be either white, green, or red in color. Under garments will not extend beyond the sleeve length (for example, sweatshirts will not be worn under a short-sleeved shirt, but may be worn with a long-sleeved shirt).

f. Tee shirts may only be worn as an

under garment and may not be worn any time as the sole upper body wearing apparel.

g. Only issued over garments may be worn unless extreme weather conditions necessitate a heavier jacket. These heavier jackets will be white, green, or red and must be approved by the Employer.

h. Only caps that are issued as a part of the uniform may be worn.

i. Shoes or boots will be clean and in good state of repair. Athletic shoes, sandals, thongs, or any other footwear deemed unsafe or inappropriate will not be worn.

Section 13. Delivery Persons' Responsibilities in the Settlement Process.[2/]

2/ At or about the commencement of the Advance Sales System the Delivery Persons' Responsibilities in the Settlement Process will be presented to the Union.

Section 14. Special Promotions 3/ - The following provisions shall apply for the parking of regular delivery trucks at the point of sale for special promotions:

a. The regular delivery trucks will be delivered and picked up by Bargaining Unit employees.

b. The regular delivery trucks may be parked only at service stations and other special promotions areas.

c. In the event the Employer exercises this method of delivery, the following will apply:

1. The Employer will pay four (4) hours straight time pay at the employee's hourly rate for each such drop.

2. The hauling of PEP bottles from the manufacturing plant in St. Louis to the Employer's facility

3/ Excluding Bulk Delivery.

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in St. Louis will be handled under the following conditions:

[a]. The Employer will make every effort to have Bargaining Unit employees haul PEP bottles from the manufacturing plant in St. Louis to the Employer's facility in St. Louis.

[b]. In case of an emergency beyond the control of the Employer, it may have the work performed by one of the following:

(i) Common carrier;

(ii) Manufacturer delivery;

(iii) Employees other than Local 688 Bargaining Unit employees.

[c]. Violation of the emergency provisions of this Agreement as set forth in [b] immedi-

ately above are subject to the grievance procedure.

[d]. Work performed by Bargaining Unit employees on an experimental basis will not serve as a permanent accretion to Bargaining Unit work assignments, nor will it be used as precedent for future hauls of that type.

Section 15. Driving Point System.4/

ARTICLE 25. MISCELLANEOUS COST PROVISIONS

Section 1. Jury Service - When an employee is called upon for jury service, he shall advise his supervisor upon receipt of summons and if taken away from his work for such service, shall, if he has completed thirty (30) days employment with Employer, be paid for his days of absence from work for such service, less the amount of the jury pay.

4/ At or about the commencement of the Advance Sales System the Driving Point System will be presented to the Union.

Section 2. Funeral Leave - In the case of death of mother, mother-in-law, father, father-in-law, brother, sister, husband, wife, child, or step-child of an employee, the Employer will grant such employee, if he has completed thirty (30) days employment with Employer, a leave of absence with pay for each day lost from work on such account until and including the day of the funeral but not to exceed a total of three (3) working days. The Employer will also grant such further leave of absence without pay as may be necessary under the circumstances. The day of the funeral for grandparents, grandchildren, sister-in-law, and brother-in-law, shall be allowed off with pay.

Section 3. Telephone Calls - The Employer will reimburse the employee for phone calls that it requires said employee to make.

Section 4. Time Off to Vote - Any employee entitled to vote in any election in the State of Missouri or any other state shall on the day of such election, be entitled to absent himself

from any service or employment in which he is then engaged or employed for a period of three (3) hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be grounds for any disciplinary action; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence, from his usual wages which but for such absence he would have been entitled to receive if such absence shall occur during any part of his normal working hours; provided, however that the Employer may specify any three (3) hours between the time of opening and the time of closing the polls during which such employee may absent himself, and provided further that this Section shall not apply to a voter on a day of election if there be three (3) successive hours while the polls are open in which he is not in the service of the Employer.

Section 5. Any employee who was hired

prior to June 1, 1975, and who was covered under the Central States Pension Fund, will not have such benefits reduced if reassigned to work in a classification to which such benefit does not apply.

Listed below are the employees who qualify for such red circled benefit:

Jack Austin
George Auten
John Becker
Paul Bitser
Donald Blaisdell
Albert Blaylock
Robert Bogen
Ted Boss
Richard Brandt
Thomas Braun
Michael Britton
Jack Bruegenhagen
Edwin Burns
Theodore Butz
Jack Callahan
William Carter
David Climer
Edgar Cook
Edward Dalton
Richard Daugherty
John Hollon
Melvin Jeffries
Bernon Kauffman
Steve Kent
Kurt Kimberlin
Norbert Knollmann
Joe Krewet
O.E. Kronk
Thomas Krutzsch
Clarence Lindsey
Tom Davis
Gerald Dempsey
Eugene Doza
Jessie Dunningans
Don Ebinger
James Fickel
Gene Frangiosa
Robert Fuess
Richard Gaede
Robert Gibson
Robert Gordon
Robert Gresham
Tom Griffith
Edward Guthrie
Harry Harris
Donald Harte
Keith Heithkoetter
Dwayne Heneger
Elroy Hoeber
Jerry Hoffman
William Naughton
Richard Nieters
Roy Nilson
James Presley
Earl Quarles
Donald Rabenort
Ralph Rothermich
Harold Savage
James Scheer
William Scheller

Phillip Lucido	Milton Simpson
Raymond Mank	Ronald Stanley
Richard Mareschal	Marvin Steghaus
Leroy McCoy	Joseph Stein
James McKenna	Roy Stroupe
Edwin McLafferty	Fred Wallace
Larry Micka	William Ward
Ray Morrow	Charles Watson
Edwin Muzzey	Frank Wendle

Section 6. Waiting Time - In the event of a breakdown of a route truck, the Delivery person shall wait one-half (1/2) hour for repairs without additional compensation. The Delivery person shall also wait one-half (1/2) hour for a reload without additional compensation. After one-half (1/2) hour of waiting either for repairs or reloads, they shall receive Ten Dollars ($10.00) per hours for such waiting time. The Employer reserves the right to schedule reloads if necessary to avoid excessive waiting time.

In the event the trucks are not loaded by the Delivery person's normal starting time, except for conditions caused by an act of God, the Delivery person will receive Ten Dollars ($10.00) for waiting time.

Section 7. Sales Meetings - In the event that Full Service employees are required to attend sales meetings for a full day, they will be compensated in accordance with Article 40, Time Off in Pay Status.

Sales and safety meetings may be called as needed. The meetings will be limited to one (1) meeting per week, unless additional meetings are reasonably required. Such meetings shall be limited to thirty (30) minutes duration.

ARTICLE 26. HOURS OF WORK */

Section 1. The Employer agrees that the normal work week shall be five (5) consecutive days. All employees shall be paid weekly.

Section 2. The normal starting time for employees other than Bulk Delivery and necessary Merchandisers shall be 6:30 a.m. to 7:30 a.m.

Section 3. Time and one-half shall be paid for all hours worked in excess of eight (8) hours per day for all hourly rated employees.

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*/ Work days and work hours may be changed after notice to the Union. Such changes are grievable only to the extent they are not made for sound business reasons.

Section 4. Time and one-half shall be paid for all hours worked on the sixth (6th) consecutive day for all hourly rated employees.

Section 5. Double time shall be paid for all hours worked on the seventh (7th) consecutive day for all hourly rated employees.

Section 6. Two and one-half times the employee's hourly regular rate, plus holiday pay, shall be paid for all hours worked on a holiday by all hourly rated employees.

Section 7. Saturday, Sunday, and Holiday Work. The Delivery person may be permitted to make deliveries to accounts on his route on Saturday, Sunday, and Holidays under the following conditions.

a. If the employee is commissioned and is required to work on a Saturday, he shall receive base pay of Forty Dollars ($40.00) plus the commission on product delivered. The employee will receive a guarantee of Ninety Dollars ($90.00) for such day. If the employ-

ee is hourly paid he shall be paid according to Article 26 and Appendix A.

b. If the employee is commissioned and is required to work on a Sunday or Holiday, he shall receive a base pay of Sixty Dollars ($60.00) plus the commission on product delivered. The employee will receive a guarantee of One Hundred Twenty Dollars ($120.00) for such day.

Section 8. In the event that a Delivery Person assigned to a route should refuse to make a delivery after returning to the facility, the Employer at a point in time will offer the work to other employees in the Drivers' Room on a seniority basis. If from the persons present in the Drivers' Room at the time of the solicitation, no employee agrees to perform the work the most junior employee present must perform such work.

Section 9. Any hourly paid employee who reports for work not having been notified the

preceding day not to report, shall be guaranteed eight (8) hours work or pay at their regular straight time hourly rate.

Section 10. All hourly paid employees scheduled to work who report for work on Saturdays, Sundays, or Holidays, will be guaranteed a minimum of four (4) hours work or pay at the applicable rate of pay.

Section 11. Any commission employee who reports for work not having been notified the preceding day not to report will be guaranteed one fifth (1/5) of his previous year's average weekly earnings for such day of absence.

ARTICLE 27. VACATIONS

Section 1. It shall be the policy of the Employer to give vacations with pay during the fifty-two (52) weeks of the year. The Employer shall strive, in allocating the vacation periods, to satisfy the desire of the individual employees by seniority with due consideration for the need of the Employer's business including the right to set reasonable limits on the

number of vacations during any particular period.

Section 2. During the calendar year 1987 and subsequent years employees who were on the rolls on May 31, 1987, shall have their vacation entitlement as follows:

a. In order to qualify for a full vacation, the employee will have had to work one hundred eighty (180) days during the preceding calendar year.

Employees who work the following amount of days will receive a pro rata vacation as follows:

0 to 44 days	1/6 Pro Rata
45 to 89 days	1/3 Pro Rata
90 to 134 days	1/2 Pro Rata
135 to 179 days	2/3 Pro Rata
180 or more	Full Vacation

Time off in pay status, Workers' Compensation and approved leaves of absence will count as days worked toward vacation entitlement.

b. Employees who have completed one (1) year of employment with the Employer

shall be entitled to one (1) week vacation with pay.

Employees who have completed two (2) years of employment with the Employer shall be entitled to two (2) weeks vacation with pay.

Employees who have completed eight (8) years of employment with the Employer shall be entitled to three (3) weeks vacation with pay.

Employees who have completed twelve (12) years of employment with the Employer shall be entitled to four (4) weeks vacation with pay.

Employees who have completed seventeen (17) years of employment with the Employer shall be entitled to five (5) weeks vacation with pay.

Employees who have completed thirty (30) years of employment with the Em-

ployer shall be entitled to Six (6) weeks vacation with pay.

Employees shall be required to take time off for vacation and shall not be permitted to accept pay in lieu of vacation.

Section 3. During the calendar year 1987 and subsequent years employees who are hired on or after June 1, 1987 shall have their vacation entitlement as follows:

a. In order to qualify for a full vacation, the employee will have had to work one hundred eighty (180) days during the preceding calendar year.

Employees who work the following amount of days will receive a pro rata vacation as follows:

Less than 52 days	No Vacation
53 to 88 days	1/5 Pro Rata
89 to 113 days	2/5 Pro Rata
114 to 145 days	1/2 Pro Rata
146 to 179 days	3/5 Pro Rata
180 or more	Full Vacation

Time off in full pay status will count as days worked toward vacation entitlement.

b. Employees hired on or after June 1, 1987, who have completed one (1) year of employment with the Employer shall be entitled to one (1) week vacation with pay.

Employees hired on or after June 1, 1987, who have completed two (2) years of employment with the Employer shall be entitled to two (2) weeks vacation with pay.

Employees hired on or after June 1, 1987, who have completed eight (8) years of employment with the Employer shall be entitled to three (3) weeks vacation with pay.

Employees hired on or after June 1, 1987, who have completed twenty (20) years of employment with the Employer shall be entitled to four (4) weeks vacation with pay.

Section 4. Employees may receive their vacation pay in advance by notifying the Employer at least one (1) week prior to his last

working day before his vacation.

Section 5. Whenever a holiday falls within an employee's vacation period, such employee shall be granted an additional day of vacation, or pay in lieu thereof, at the employee's option, provided he has given the Employer prior notice.

Section 6. Any employee whose service with the Employer becomes terminated under any circumstances shall receive all accumulated vacation benefits on a pro rata basis.

Section 7. All hourly rated employees shall receive forty (40) hours pay for each week of vacation.

Section 8. Employees will be permitted to split one (1) of their weeks of vacation. Split week selections will only be permitted after the completion of bidding. The employee must give the Employer forty-eight (48) hours notice, and the request will be granted if business permits.

ARTICLE 28. INSURANCE AND WELFARE

The Employer will contribute to the Union's Insurance and Welfare Fund for all employees the

following amount:[5]/

June 1, 1987	$_____ Per Week
June 1, 1988	$_____ Per Week
June 1, 1989	$_____ Per Week
January 1, 1990	$_____ Per Week

Payments shall be made the month following completion of the thirty (30) days of employment, provided the employee has worked ten (10) days during the month.

The Employer agrees to execute said agreements of trust and such other documents or papers as may be necessary to effectuate said Insurance and Welfare Program and the purposes announced therein.

The execution of this Agreement will be regarded as execution of the Trust Indenture provided, however, that the Employer agrees to execute any other documents as may be necessary to carry out the intents and purposes of the Trust. The Employer hereby ratifies all actions already taken or to be taken by such trustees within the scope of their authority.

5/ The contribution will not exceed Forty Dollars ($40.00) per month per employee.

ARTICLE 29. PENSIONS

Section 1. Effective June 1, 1987, for each of the employees covered by this Agreement, the Employer agrees to contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of Sixty-Five Dollars ($65.00) per week for each employee who has been on the payroll thirty (30) days or more, and who has worked one (1) day in a week or who was in pay status during any week.

Section 2. Effective June 1, 1988, the Employer agrees to inplement increases applicable to similarly situated employers, but in no event shall such increase exceed five percent (5%).

Section 3. Effective June 1, 1989, the Employer agrees to implement increases applicable to similarly situated employers, but in no event shall such increase exceed five percent (5%).

Section 4. The Union and the Employer agree to be bound by, and hereby assent to all

of the terms of the Trust Agreement creating said Central States, Southeast and Southwest Areas Pension Fund, all of the rules and regulations heretofore and hereafter adopted by the Trustees of said Trust Fund pursuant to said Trust Agreement, and all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted. The Employer hereby accepts as Employer Trustees the present Employer Trustees appointed under said Trust Agreement and all such past or succeeding Employer Trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement. The Union hereby accepts as Union Trustees the present Union Trustees appointed under said Trust Agreement and all such past or succeeding Union Trustees as shall have been or will be appointed with the terms of the Trust Agreement. The Employer agrees that it will execute said attached Agreement of Trust and such other documents or papers as may be necessary to

effectuate said Welfare and Pension Programs and the purposes announced therein.

Retirement shall be compulsory in conformance with the rules of the Central States Pension Fund.

ARTICLE 30. SICK LEAVE

Section 1. Eligible employees shall accumulate sick days at the rate of one (1) day for each month of service after six (6) months of employment, and shall use these days at the rate of one (1) day for which they receive pay in accordance with the provisions of this Section.

Section 2. The employee will not be paid for the first day off due to sickness or injury.

Section 3. Unused sick leave may be accumulated to a total of one hundred (100) days. All employees who retire during the life of this Agreement will receive fifty percent (50%) of the sick days accumulated and not used in the three (3) year period preceding their retirement date.

Section 4. At its cost, the Employer may

require a report from its medical doctor certifying that the employee was unable to work.

Section 5. Eligible employees with six (6) months or more of service shall be furnished a disability plan as follows:

a. The weekly benefit will be Two Hundred Dollars ($200.00) per week for a maximum of twenty-six (26) weeks.

b. The benefits shall begin on the sixth (6th) day of illness and on the first (1st) day of injury due to an accident or illness requiring immediate hospitalization.

c. A certificate from a medical doctor certifying that the employee is unable to work will be required, and the Employer reserves the right to require an examination by a doctor of its choice at its expense.

d. The employee must return to active employment before becoming eligible for additional benefits.

e. If an employee is in layoff status or on leave of absence or will be subject to layoff while drawing this benefit, the benefit will be discontinued until such time as the employee, but for the disability, would be working.

f. All accumulated sick days must be used before an employee begins to receive benefits under this plan.

ARTICLE 31. MEDICARE

Effective June 1, 1987, the Employer shall pay for and on behalf of each regular employee of the Employer who is subject to the terms and conditions of this Agreement, _____ Dollars ($_____)[6]/ per month for the term of this Agreement, which payment shall be made by the Employer to the Trustees of a Trust under a certain Indenture created for the purpose of providing medical benefits and care for the employees and their spouses and/or life insur-

6/ The contribution will not exceed Twenty-Two Dollars ($22.00) per month per employee.

ance for said employees (all as therein defined) subsequent to said employee's retirement, and the form and provision of which Trust are expressly agreed and provided by the Employer as though time to time be amended; provided, however, that the Employer agrees to execute any other documents as may be necessary to carry out the intent and purposes of this provision. The Employer hereby ratifies all actions already taken by such employees within the scope of their authority.

This Article is subject to the terms of the "Early-Out" Agreement.

ARTICLE 32. LABOR HEALTH INSTITUTE

Effective June 1, 1987, and continuing to January 1, 1990, the Employer will contribute Two Hundred Fifty-Four Dollars ($254.00) per month for each employee covered by this Agreement to the St. Louis Labor Health Institute.

Effectuve January 1, 1990, said contribution shall be increased to Two Hundred Ninety-Two Dollars ($292.00) per month.

Payments shall be made the month following completion of thirty (30) days of employment, provided the employee has worked ten (10) days during the month.

Payments shall be made the month following completion of thirty (30) days of employment, provided the employee has worked ten (10) days during the month.

Such payments shall entitle the employees of the Employer covered by this Agreement to regular membership in the St. Louis Labor Health Institute for themselves and their dependents as associate member under the Family "A" Plan. He and his dependents shall be entitled to such medical services and hospital benefits as are provided in the Rules and Regulations of the Labor Health Institute.

Payments to the St. Louis Labor Health Institute hereunder shall be made monthly and shall continue for the duration of this Agreement.

The Employer shall have no right, title, or

interest in any monies so paid or in the funds of the St. Louis Labor Health Institute or its control or management except as provided by the By-Laws of the St. Louis Labor Health Institute.

No employee shall have any right, title, or interest in any monies so paid or any claim against the Employer, or the St. Louis Labor Health Institute, or the Union, or any right, title, or interest in the control and management of St. Louis Labor Health Institute, except as provided by the By-Laws of said St. Louis Labor Health Institute.

The Employer's and employees' right, title, and interest shall be limited to medical and health services to employees while said employee is in the employ of said Employer, except as otherwise provided by the By-Laws of said St. Louis Labor Health Institute.

This Article is subject to the terms of the "Early-Out" Agreement.

ARTICLE 33. L.H.I. SUPPLEMENTAL BENEFITS PLAN

Efective June 1, 1987, the Employer will

pay monthly into the St. Louis Labor Health Institute (hereafter called the L.H.I.) for each employee within the Collective Bargaining Unit covered by this Agreement, the amount of Twenty-Eight Dollars Fifty Cents ($28.50) per employee per month.

Effective July 1, 1988, and for the remainder of this Agreement, the Employer will pay monthly into St. Louis Labor Health Institute (hereafter called the L.H.I.) for each employee within the Collective Bargaining Unit covered by this Agreement, the amount of Twenty-Nine Dollars Fifty Cents ($29.50) per employee per month.

This shall entitle employees of the Employer for whom benefits are made to regular membership in the L.H.I. Supplemental Benefits Plan and to such benefits thereunder for themselves and their dependents as shall be defined in the Rules and Regulations of the L.H.I. covering such Plan.

All contributions due the L.H.I. under this

Article shall be due and payable at the times and subject to the same provisions covering reporting and payment as are contained in that Article of this Agreement headed "LABOR HEALTH CLAUSE".

Payments shall be made following the completion of thirty (30) days of employment provided the employee has worked ten (10) days during the month.

This Article is subject to the terms of the "Early-Out" Agreement.

ARTICLE 14. EMPLOYER SAVINGS PLAN

The Employer will institute a 401K Plan under which employees who do not elect the "Early-Out" Program and who were employed on May 11, 1987, may contribute up to seventeen percent (17%) of their annual compensation. The Employer will contribute fifty percent (50%) of the employee's contribution to a maximum of three percent (3%).

Example A. Employee contributes between six percent (6%) and seventeen percent (17%), Employer contributes three percent (3%) (maximum).

Example B. Employee contributes between one percent (1%) and six percent (6%), Employer contributes one-half (1/2).

This Plan will be implemented on or before September 1, 1987.

ARTICLE 35. HOLIDAYS

Section 1. The following shall be holidays:

New Year's Day	Veterans Day
Memorial Day	Thanksgiving Day
Independence Day	Christmas Day
Labor Day	Employee's Birthday

Section 2. Employees who have completed thirty (30) days of service with the Employer and who have worked the business day before and the business day after said holidays, unless excused by the Employer, shall receive pay for said holidays without working on such days.

Section 3. Any employee who would otherwise be eligible for holiday pay and who is laid off through no fault of his own within five (5) working days before one of said holidays, or is recalled from layoff within five (5) working days after one of said holidays, or is recalled from layoff within five (5) working days after

one of said holidays, shall be paid for such holiday.

Section 4. Hours worked on any said holidays shall be compensated at two and one-half (2 1/2) times the employee's regular hourly rate, plus holiday pay, if eligible.

Section 5. Employees with one (1) year of seniority will be granted a Personal Holiday. This Holiday will be granted by seniority, based on the business needs of the Employer and must be selected at least forty-eight (48) hours in advance of said Holiday.

Section 6. Any employee otherwise eligible for Holiday pay shall receive pay for the above listed Holidays during the first twelve (12) months of absence due to a work-related injury.

Section 7. Birthday Holiday. The Birthday Holiday must be observed on the day of the birthday. If the birthday falls on Saturday, it will be observed on the preceding Friday. If it falls on Sunday, it will be observed on the following Monday. If the birthday falls on a

designated Holiday, it may be observed on the preceding or following scheduled work days.

ARTICLE 36. MISCELLANEOUS OPERATIONAL PROVISIONS

Section 1. No commission employee assigned to a route will be required to service an account upon returning to the Sales Center, provided he has called the Employer immediately prior to leaving the route, and has properly serviced the account. Accounts that call in must be made no later than the following normal work day.

Section 2. No employee shall be required to load their route truck.

Section 3. It is agreed that the routes will not be structured by the Employer in such a manner as to cause the employee to work an unreasonable amount of hours.

ARTICLE 37. TRUST AGREEMENTS AND TRUSTEES

The Employer agrees that in accepting and signing this Agreement, they also agree to accept and be bound by each and every Trust Agreement creating the Trust or Trusts listed

above to which said Employer has agreed to make contributions, as well as to all amendments thereto which have been made or which may hereafter be made, such acceptance being as fully as if said Employer has executed the Trust Agreements and amendments thereto themselves; provided, however, that in no event shall the Employer be bound by any provision of any such Trust Agreement or amendment thereto which obligates the Employer to make any contribution larger than set out in this Agreement. Further, said Employer agrees to accept as Employer Trustees the present Employer Trustees appointed under the particular Trust Agreement and all such past or succeeding Employer Trustees as shall have been or will be appointed in accordance with the terms of the particular Trust Agreement, hereby expressly waiving all right to participate in the naming of Employer Trustees (unless said Employer is entitled to participate in the naming of Employer Trustees by reason of being a signatory on the particular Trust Agreement itself).

ARTICLE 38. TRANSFER OF COMPANY TITLE OR INTEREST

This Article shall be binding upon the parties hereto, their successors, assigns, transferees, lessees, etc.

It is understood that the Employer shall not use any leasing device to a third party to evade the Agreement.

In the event the Employer sells, leases, or transfers all or any portion of the operation covered by the Agreement, or contracts out or subcontracts all or any portion of the work currently performed by its employees under the Agreement, the Employer shall notify the Union in writing prior to the transaction taking effect of the nature and conditions of the sale, lease, transfer, contracting out or subcontracting; and further, the Employer shall, as an express condition of the sale, lease, transfer, contracting out or subcontracting, require the buyer, lessee, transferee, contractor or subcontractor to agree to the following terms and conditions.

a. Employment shall be offered to employees currently performing work to the extent needed in order of seniority, and such employees shall immediately be put to work to the extent needed without any probationary period or requirement for application or examination. Employees not put to work immediately shall be placed on layoff status and shall be offered employment in order of seniority whenever vacancies occur or additional hiring is required.

b. The buyer, lessee, transferee, contractor, or subcontractor shall recognize the Union as the collective bargaining representative of the employees without further certification, and shall bargain with the Union concerning wages, hours, and other terms and conditions of employment employed under the Agreement.

In the event the Employer reassumes all or any portion of an operation previously sold,

leased, or transferred, or reassumes all or any portion of work previously performed and contracted out or subcontracted, the Employer shall offer employment to employees currently performing the work to the extent needed in order of their seniority, and shall put said employees to work to the extent needed without any probationary period or requirement for application or examination; and shall immediately notify the Union and enter into negotiations for an agreement covering said employees.

The Employer agrees that if it contracts out or subcontracts all or a portion of the work currently performed by its employees covered by the Agreement and later changes the contractor or subcontractor, the provisions of this Article shall apply to any successor contractor or subcontractor.

In the event any contractor or subcontractor becomes sixty (60) days delinquent in payment to any Health and Welfare or Pension Fund as provided by the Agreement, the Employer, upon

written notice from the Union, shall deduct amounts due from the contractor's or subcontractor's amounts payable and remit the same to the respective Fund.

If any portion or section of this Article is determined to be illegal, that portion or section, and only that portion or section, shall be deleted and subject to negotiations between the parties. If the parties in such event are unable to reach agreement, either party shall be permitted recourse to lawful, economic action, anything in the Agreement to the contrary notwithstanding.

ARTICLE 39. RIOTS, ACTS OF GOD

In the event the Employer is forced to suspend operations, in whole or in part, as a result of events over which it has no control such as riots, fire, flood, etc., and acts of God, the Employer shall be relieved of all obligations and commitments hereunder for the period during which operations are suspended. The Employer agrees to make every reasonable

effort to reactivate suspended operations as quickly as possible.

ARTICLE 40. TIME OFF IN PAY STATUS

Section 1. Hourly employees will be paid eight (8) hours pay at his regular hourly rate for each day of absence while in time off pay status.

Section 2. Employees paid on a commission basis will be paid one-fifth (1/5) of one fifty-second (1/52) of the previous years W-2 earnings.

ARTICLE 41. ROUTE ADJUSTMENTS

Section 1. The Employer agrees to make every attempt to maintain the relative position of each Full Service employee with respect to all other Full Service employees within the precepts of good sales management. The Employer shall have the right to reduce the number of routes and consolidate case volume derived therefrom into the remaining routes.

Section 2. It is understood by the parties that a route may become unwieldy; and, in such

event, shall after discussion between the Employer and the Full Service employee involved be adjusted.

ARTICLE 42. JOB CLASSIFICATIONS, COMMISSIONS AND WAGES

The job classifications, rates of pay, and commissions have been negotiated as set out in EXHIBIT "A".

ARTICLE 43. PROGRESSIVE DISCIPLINE

Progressive discipline will be followed in the three (3) general categories referenced in Article 13: absenteeism/tardiness, work performance, and/or misconduct.

1. First offense - counseling (documented).

2. Second offense - next offense within six (6) months of the prior offense - written warning.

3. Third offense - next offense within six (6) months of the prior offense - three (3) days suspension.

4. Fourth offense - next offense within six (6) months of the prior offense - ten (10) days suspension.

5. Fifth offense - next offense within six (6) months of the prior offense - discharge.

The above procedure is set out for progressive discipline of offenses that occur within six (6) months of the prior offense. The following is the procedure that applies if the offense occurs after the six (6) month period:

1. The next offense that occurs between the seventh (7th) and twelfth (12th) month of the previous offense - repeat the previous step.
2. After the twelve (12) months of the prior offense the employee will have his record cleared.

ARTICLE 44. SEASONAL EMPLOYEES

The Employer may hire seasonal employees during the period of May 15 through September 15, and December 15 through January 5. Such employees shall have no rights or privileges under the terms of this Agreement and shall not be employed for a period longer than ninety (90) calendar days regardless of whether such employment is continuous or not.

ARTICLE 45. TERMINATION OF AGREEMENT

This AGREEMENT shall become effective as of the 1st day of June, 1987, and shall remain in full force and effect until midnight, May 31, 1990, and shall continue in effect for an additional year thereafter, unless written notice of termination or desired modification is given by either of the parties hereto to the other at least sixty (60) days prior to said expiration date of any subsequent anniversary thereof. The Post Office Address of COCA-COLA BOTTLING COMPANY OF ST. LOUIS is 19 WORTHINGTON DRIVE, MARYLAND HEIGHTS, MISSOURI 63043.

The Post Office Address of the UNION is 300 SOUTH GRAND BOULEVARD, ST. LOUIS, MISSOURI 63103.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date noted in the Preamble.

COCA-COLA BOTTLING
COMPANY OF ST. LOUIS

By: /s/ Jerry M. Graves
Jerry Graves
General Manager

TEAMSTERS LOCAL UNION NO. 688 Affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By: /s/ Kenneth DeGrande
Kenneth DeGrande
Business Representative

NEGOTIATING COMMITTEE:

/s/ John Becker

/s/ T. Boss

/s/ William Keller

/s/ Thomas E. Miller

/s/ William ?

/s/ George W.

/s/ John G. Burns

/s/ ???

/s/ ???

/s/ ???

EXHIBIT "A"

Hourly Rated and Commission Employees:

	6/1/87 */	6/1/88	6/1/89
a. Red Circle Employees (current Driver Salespersons, Bulk Drivers and Relief Drivers employed in those classifications as of (5/31/87)	$18.00/hr	$18.45/hr.	$18.90/hr.
b. Regular Delivery (current Helpers, Full Service, Pre-Mix/Post Mix employees in those classifications as of (5/31/87)	$15.00/hr.	$15.45/hr.	$15.90/hr.
c. Full Service	.60/case	.61/case	.62/case
d. New Hires (Hired after 5/31/87 regardless of classification)	$12.00/hr	$12.45/hr.	$12.90/hr.
e. Seasonal	$ 7.50/hr.	$ 7.50/hr.	$ 7.50/hr.

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*/ Upon implementation of the Advance Sales System the hourly rates referenced herein will take effect.

APPENDIX L

PROJECTED FEDERAL CASELOAD INCREASES DUE TO INCREASED APPEALS FROM LABOR ARBITRATION (BASED ON TOTAL U.S ARBITRATION CASES DECIDED IN 1986)

1. ARBITRATION CASES DECIDED IN THE U.S. IN 1986	69,872*	69,872	69,872
2. APPEAL RATE	14.8%**	20%	25%
3. DISTRICT COURT INCREASE - BY NUMBER OF ADDITIONAL CASE FILINGS (Line 1 x Line 2)	10,341	13,974	17,468
4. APPELLATE COURT INCREASE - BY NUMBER OF ADDITIONAL CASE FILINGS (Line 3 x Line 2)	1,530	2,795	4,367
5. DISTRICT COURT INCREASE - BY PERCENTAGE OF TOTAL 1986 DISTRICT COURT CASE FILINGS	3.6%	4.9%	6.1%
(Line 3 ÷ 285,366 *** cases)			
6. APPELLATE COURT INCREASE - BY PERCENTAGE OF TOTAL 1986 APPELLATE COURT CASE FILINGS	4.5%	8.2%	12.7%
(Line 4 ÷ 34,292 **** cases)			

* 69,872 total labor arbitration cases decided in the U.S. in 1986. Brognanno and Coleman, Labor Arbitration In America: The Profession and Practice (1992) at 92. This is the only year for which such total has been computed.

** In 1991 there were 253,282 cases terminated by the U.S. District Courts. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 2 (1991) (211,713 civil cases terminated plus 41,569 criminal cases terminated equals 253,282 total cases terminated). There were 37,410 appeals filed from District Court terminations in 1991. 1991 ANNUAL REPORT OF THE DIRECTOR, p. 4, Table 2 (27,461 civil cases appealed plus 9,949 criminal cases appealed equals 37,410 cases appealed from District Court cases). Thus, 14.8% of District Court terminations were appealed to in the U.S. Circuit Courts of Appeals in 1991. (37,410 appeals filed divided by 253,282 district court terminations equals 14.8%).

*** ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 3, Table 2 (1990) (243,946 civil cases filed in the District Courts plus 41,420 criminal cases filed in the District Courts equals 285,366 total District Court case filings in 1986).

**** ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 3, Table 1 (1991).

APPENDIX M

PROJECTED FEDERAL CASELOAD INCREASES DUE TO EROSION OF USAGE OF LABOR ARBITRATION (BASED ON TOTAL U.S. ARBITRATION CASES INITIATED IN 1991)

1.	ARBITRATION CASES INITIATED IN THE U.S. IN 1991	112,903*	112,903	112,903
2.	ASSUMED PERCENTAGE BROUGHT DIRECTLY IN FEDERAL COURT	20%	40%	100%
3.	DISTRICT COURT INCREASE - BY NUMBER OF ADDITIONAL CASE FILINGS (Line 1 x Line 2)	22,581	45,161	112,903
4.	APPEAL RATE	14.8%**	14.8%	14.8%
5.	APPELLATE COURT INCREASE - BY NUMBER OF ADDITIONAL CASE FILINGS (Line 3 x Line 4)	3,342	6,684	16,710
6.	DISTRICT COURT INCREASE - BY PERCENTAGE OF TOTAL 1991 DISTRICT COURT CASE FILINGS (Line 3 ÷ 254,777*** cases)	8.9%	17.7%	44.3%

7.	APPELLATE COURT INCREASE - BY PERCENTAGE OF TOTAL 1991 APPELLATE COURT CASE FILINGS	8.0%	15.9%	39.8%

(Line 5 ÷ 42,033**** cases)

* American Arbitration Association (AAA) and Federal Mediation and Conciliation Service (FMCS) process about 40% of labor arbitration cases in the United States. The largest source of arbitration cases is permanent panels and almost as many cases come to arbitrators by direct appointments as come through either AAA or FMCS. Brognanno and Coleman, Labor Arbitration In America: The Profession and Practice, at 152 (1992). In 1991, there were 28,731 arbitration panels requested through FMCS. FEDERAL MEDIATION AND CONCILIATION SERVICE ARBITRATION STATISTICS, 1991. In addition, there were 16,430 labor cases filed with AAA in 1991. AMERICAN ARBITRATION ASSOCIATION CASE FILING REPORT FOR 1991. Thus, there were 45,161 total cases processed through AAA and FMCS in 1991. These 45,161 cases processed through FMCS and AAA represents 40% of a total 112,903 labor arbitration cases initiated in the U.S. in 1991. (112,903 x 40% = 45,161).

** In 1991 there were 253,282 cases terminated by the U.S. District Courts. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 2 (1991) (211,713 civil cases terminated plus 41,569 criminal cases terminated equals 253,282 total cases terminated). There were 37,410 appeals filed from District Court terminations in 1991. 1991 ANNUAL REPORT OF THE DIRECTOR, p. 4, Table 2 (27,461 civil cases

appealed plus 9,949 criminal cases appealed equals 37,410 cases appealed from District Court cases). Thus, 14.8% of District Court terminations were appealed to in the U.S. Circuit Courts in 1991. (37,410 appeals filed divided by 253,282 district court terminations equals 14.8%).

*** There were 254,777 new cases filed in the U.S. District Courts in 1991. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 2 (1991) (207,742 new civil cases filed plus 47,035 new criminal cases filed).

**** There were 42,033 new cases filed in the U.S. Courts of Appeals in 1991. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, p. 2 (1991).

92-403

No.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TEAMSTERS LOCAL UNION No. 688, affiliated with the, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioners,

vs.

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Respondent.

Appeal to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MILLER & MARTIN

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QUESTIONS PRESENTED

1. Whether the U.S. District Court for the Eastern District of Missouri and the U. S. Court of Appeals for the Eighth Circuit appropriately and correctly exercised their authority when they vacated an arbitration award that did not draw its essence from a negotiated last chance agreement?

2. Whether the routine judicial review of an arbitration decision at a time when the federal court system is already heavily overloaded raises "special or important reasons," for the granting of a Petition for Writ of Certiorari by this Honorable Court?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court. A list of all parent and subsidiary companies of the Respondent was provided pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States in Respondent's Request for an Extension of Time in which to respond to Petitioner's Petition for Writ of Certiorari, filed earlier in this case.

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APPENDIX C

Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment on Counterclaim and in Support of its Cross Motion for Summary Judgment in the U.S. District Court for the Eastern District of Missouri C-1

* On page iv of the Petition, the Petitioner incorrectly identifies Appendix H as Plaintiff's Motion for Summary Judgment in the U.S. District Court for the Eastern District of Missouri. In actuality, Petitioner's Appendix H is Defendant's Motion for Summary Judgment on Counterclaim in the U.S. District Court for the Eastern District of Missouri.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TEAMSTERS LOCAL UNION NO. 688, affiliated with the, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioners,

VS.

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Respondent.

Appeal to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Eastern District of Missouri is reported at 959 F.2d 1438, No. 91-2876 (8th Cir., March 26, 1992), and is reproduced at Petitioner's Appendix C.

The unreported opinion of the United States District Court for the Eastern District of Missouri vacating the arbitration award is

reproduced at Petitioner's Appendix F (incorrectly cited as Appendix E in Petition for Writ of Certiorari, p.2).

The arbitration award granting reinstatement to the grievant is reproduced at Petitioner's Appendix I (incorrectly cited as Appendix H in Petition for Writ of Certiorari, p.2).

STATUTORY PROVISIONS INVOLVED

Arbitration Act, 9 U.S.C. §10(a):

> In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) When an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Labor Management Relations Act, 29 U.S.C. §185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. . . .

STATEMENT OF CASE

Coca-Cola Bottling Company of St. Louis, Inc. ("Respondent") is engaged in the production and sale of Coca-Cola and other soft drink products. The Respondent has collective bargaining relationships with four (4) labor organizations, including Teamsters Local Union No. 688 ("Petitioner").

As pointed out by the Petitioner, this proceeding is the result of a series of grievances filed by Kenneth Youngermann, a former employee of the Respondent. Mr. Youngermann was employed as a driver and was subject to the collective bargaining agreement entered into between the Respondent and the Petitioner. Pursuant to this collective bargaining agreement, Mr. Youngermann's grievances were submitted to an impartial arbitrator, and ten (10) discrete arbitrations were heard on October 4-6, 1989 and January 30-February 2, 1990. The Arbitrator issued his Opinion and Award on September 17, 1990, which ordered the reinstatement of Mr. Youngermann. (Petitioner's APP. I-1; I-76). This conclusion precipitated the filing by the Respondent of this case now on appeal.

Effective January 18, 1988, the Respondent implemented its Rules and Regulations and attendant disciplinary procedures, which called for a progressive disciplinary system. These Rules and Regulations establish three (3) categories of violations, each requiring different numbers of violations before termination is

warranted. (Petitioner's APP. I-11 to I-13). Under the Rules, the discipline for Category A violations ranged from counseling sessions and warnings to "[i]mmediate suspension without compensation, pending investigation for termination." (Petitioner's APP. C-3; Petitioner's APP. I-11 to I-13).

Prior to August 16, 1988, Mr. Youngermann had already received the first four steps of discipline under the five-step procedure for Category A violations. (Petitioner's APP. I-29 to I-31). Mr. Youngermann's fifth and dischargeable step was comprised of three separate incidents, including two instances involving customer complaints about Mr. Youngermann's unacceptable performance and behavior while servicing their accounts. *Id.*

As a result of the above, a meeting was held on September 6, 1988, between Mr. Youngermann, two union stewards, and three representatives of the Respondent to discuss Mr. Youngermann's impending discipline. During this meeting, there was a full and complete discussion of the reasons for Mr. Youngermann's impending termination. At the Petitioner's urging, however, the Respondent agreed not to terminate Mr. Youngermann but to give him one last chance to reform. Therefore, pursuant to the Union's urging, the Company drafted a disciplinary action notice, which was characterized as a "Last Chance Agreement". (Petitioner's APP. I-15 to I-16). This Last Chance Agreement provides as follows:

> *Pursuant to the Union's recommendation* on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that

the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. (Emphasis added).

(Petitioner's APP. J).

This Last Chance Agreement, among other things, gave the Respondent the explicit right to immediately terminate Mr.

Youngermann on the happening of any "such offense of a similar and/or like nature" in violation of a Category A Rule or Regulation. It also spelled out other misconduct which would be prohibited, such as "continuation of poor work performance, including carelessness, inefficiency, and inattention to duties." (Petitioner's APP. J). The document was read and signed by the Respondent's representatives and the union stewards. Even though Mr. Youngermann did not sign the agreement, the Arbitrator found that the union stewards signed as his collective bargaining representatives, thereby binding Mr. Youngermann to the terms of the Last Chance Agreement. (Petitioner's APP. I-63)

Following the execution of the Last Chance Agreement, the Respondent continued to have problems with Mr. Youngermann's work performance. These problems resulted in a 40-day suspension without compensation in December, 1988, which, although grieved and arbitrated as one of the ten discrete arbitrations, was upheld by the Arbitrator as justified. (Petitioner's APP. I-66).

Additional problems following the December 40-day suspension ultimately led to Mr. Youngermann's termination on May 1, 1989. (Petitioner's APP. I-35 to I-40) The events which led to Mr. Youngermann's termination on May 1, 1989, again reflect his inability or unwillingness to comply with job requirements which even the newest employee would find readily achievable.

The first incident occurred on April 6, 1989, when Distribution Supervisor Steve Juenger accompanied Mr. Youngermann on his route, after being advised by Mr. Youngermann that he did not feel "qualified" to run his route despite years of experience as a delivery driver. On elementary job duties Mr. Youngermann required the direction from Mr. Juenger one would expect of a new hire, and when requested by Mr. Juenger to perform certain tasks Mr. Youngermann simply responded that he was not qualified to run the route. On several occasions, Mr. Juenger had

to give Mr. Youngermann direct orders to perform his job duties, including a direct order to get out of the delivery truck and to commence work. (Petitioner's APP. I-35 to I-38)

A second incident occurred on March 28, 1989, when a Wal-Mart store manager experienced a problem with Mr. Youngermann.[1] The store manager testified that Mr. Youngermann made a Coca-Cola delivery to the store in which he managed on March 28th and refused to take the order into the warehouse as required. Instead, Mr. Youngermann left the product at the door, and, worse yet, left it in a position that interfered with the Wal-Mart operation. (Petitioner's APP. I-40 to I-42)

A third situation arose on April 19, 1989, when Mr. Youngermann, his immediate supervisor, and a union steward were called to a meeting by Distribution Superintendent Roustio. The evidence is unchallenged, even by the Union, that the purpose of the meeting was remedial, not disciplinary. Mr. Youngermann was handed three (3) memos for instructional purposes which addressed the following issues: the Wal-Mart store incident referenced immediately above; an incident involving Mr. Youngermann spending in excess of one (1) hour and thirty-eight (38) minutes to verify a $2.00 or $3.00 shortage; and his failure to follow two direct orders from Distribution Supervisor Steve Juenger on April 6, 1989, referenced hereinbefore. (Petitioner's APP. I-42 to I-49). During the meeting Mr. Roustio said Mr. Youngermann became defensive after having had the three (3) instructional memos read to him. He resisted efforts to use the meeting and memos as positive instructions and opportunities intended to correct his behavior. After Mr. Youngermann characterized the Respondent and Mr. Roustio as being ignorant, stupid, and ridiculous, Mr. Roustio, quite candidly testified that

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[1] This was documented by a memo from the store manager dated April 11, 1989.

he lost his temper and advised Mr. Youngermann he was suspended for "insubordination". (Petitioner's APP. I-43 to I-45). Subsequently, Mr. Roustio learned of the following misconduct by Mr. Youngermann.

On April 19th Distribution Supervisor Ryan happened to examine the interior of Mr. Youngermann's vehicle. He found it in total disarray and in violation of a Category A rule. Mr. Ryan called two union stewards over to examine the truck. They expressed their amazement by one or both inquiring, "Whose truck is this?" (Petitioner's APP. I-43).

Subsequently, Mr. Roustio learned of two other Category A rule violations which had been committed by Mr. Youngermann. He was advised that on April 18, 1989, Mr. Youngermann had failed to clock out at the end of his workday, for which he had been previously warned, and that he had failed to properly fill out a Department of Transportation record.

Mr. Youngermann was suspended on April 19, 1989. On April 26, 1989, a Disciplinary Action Notice was filled out, outlining the above violations, and a discharge letter was issued on May 1, 1989. (Petitioner's APP. I-49 to I-50). The Respondent terminated Mr. Youngermann for being in violation of the Last Chance Agreement.

Being well aware of the fact that the Last Chance Agreement existed and was binding on Mr. Youngermann, the Arbitrator chose to ignore its existence and decide the grievances in relation to the just cause standards enunciated in the main collective bargaining agreement. (Petitioner's APP. I-56 to I-60). In so doing, the Arbitrator formulated the issue as follows: "was the grievant discharged for cause, and if not, what is the proper remedy under the [Collective Bargaining] Agreement." (Petitioner's APP. I-59). Under this standard, the Arbitrator found that the Respondent did not have just cause to terminate Mr. Youngermann and that no violation of the Last Chance

Agreement had taken place. With respect to the condition of Mr. Youngermann's truck, the Arbitrator found that others had similarly left their vehicles in disarray. With regard to the transposition of numbers on the DOT form, he found the erroneous entry to have been an "inadvertent transposition." (Petitioner's APP. I-72 to I-74). A violation was found, however, with respect to Mr. Youngermann's failure to clock out at the end of his shift. While the Arbitrator ruled that this violation was *de minimis* and did not warrant discharge, (*Id.*), the District Court and the Court of Appeals, on a proper review of the Arbitrator's award, correctly found that the violation, *de minimus* or not, was adequate basis for discharge under the terms of the Last Chance Agreement, which superseded the collective bargaining agreement, including the just cause provisions contained therein.

SUMMARY OF ARGUMENT

This case involves the routine review of an arbitrator's decision. No special or important legal issues are presented herein which require judicial review by this Honorable Court. Neither the U.S. Court of Appeals nor the U. S. District Court issued a decision in contravention of established precedent rendered by this Court or by any other court. Furthermore, the decision below is not "so far departed from the accepted and usual course of judicial proceedings," and does not "sanction such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10(a) of Rules of the Supreme Court of the United States. While unable to address the merits of a dispute, it is clearly established that courts are free to set aside an arbitration award that does not "draw its essence" from the collective bargaining agreement. Such is the case at hand. Finding that the Arbitrator's decision ignored the plain and unambiguous terms of the Last Chance Agreement, the District Court correctly found, and the Court of Appeals properly affirmed, that it did not draw its essence from the Last Chance Agreement.

ARGUMENT

A. The Lower Federal Court Decisions Do Not Contradict Or Undermine The Well-Established Principles Established By This Court

The Petitioner is correct in its assertion that the judicial review of arbitration awards is very limited. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987), *Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Union Workers*, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300, *reh'g denied*, 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Any "judicial non-interventionist" policy adopted by this Court in the *Steelworkers Trilogy* cited by the Petitioner,[2] however, does not, and has not, completely foreclosed the review of arbitration decisions by federal courts.

To the contrary, this Court has made it very clear that judicial review, while limited, is still proper when the arbitration award fails to draw its essence from the collective bargaining agreement. *Misco, Inc.*, 484 U.S. at 36; *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. While it is generally recognized that courts may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract," *Misco, Inc.*, 484 U.S. at 36, and that courts must generally give deference to an arbitrator's decision even if the court would have decided the case differently had it considered the matter in the first instance, *Nolde Bros. Inc.*, 430 U.S. at 253-54, courts may review and overturn

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[2] The *Steelworkers Trilogy* consists of: *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.*

a decision that has no rational basis rooted in the collective bargaining agreement, *Id.* No such rational basis exists where the arbitrator has acted in excess of the authority granted to him by the collective bargaining agreement, *Bakers Union Factory, #326 v. ITT Continental Baking Co.*, 749 F.2d 350, 353 (6th Cir. 1984), or where the award is merely the arbitrator's "own brand of industrial justice," *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. In such situations, the award does not draw its essence from the collective bargaining agreement, and the court is free to review and overturn the award without conflicting with, disregarding, or undermining the principles set forth in the *Steelworkers Trilogy*.

The Court of Appeals and the District Court in the case at hand did not contravene established precedent of this Court or any other court by reviewing and ultimately vacating the arbitrator's award. In fact, both courts specifically recognized the above-mentioned principles, (Petitioner's APP. C-7 to C-8; Petitioner's APP. F-4 to F-6), and, without reviewing the merits of the case, correctly found that the arbitrator's decision failed to draw its essence from the Last Chance Agreement involved herein.

Federal policy strongly favors the private settlement of labor disputes. *Misco, Inc.*, 484 U.S. at 37. This policy, however, encompasses more than just the finality of arbitration awards; it also encourages the use of other means of settlement, such as last chance agreements.

> It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

Bakers Union Factory, #326, 749 F.2d at 353 (quoting *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d

Cir. 1977)). Thus, while parties who have bargained for an arbitrator's interpretation of a contract should generally not be deprived of such interpretation, "[p]arties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Bakers Union Factory, #326*, 749 F.2d at 354. The parties in the case at hand reached such an agreement, i.e., the Last Chance Agreement which was clearly meant to override the terms of the collective bargaining agreement with respect to any further rule violations by Mr. Youngermann. It only follows, then, that the obligations of the parties are controlled by such agreement. *Bakers Union Factory, #326*, 749 F.2d at 354 ("the policy in favor of the finality of arbitration must yield to the broader policy in favor of the parties' chosen method of non-judicial dispute resolution."). Thus, the issue before the lower courts was whether the Arbitrator's decision drew its essence from the Last Chance Agreement.

That the Arbitrator's decision in the case at hand did not draw its essence from the Last Chance Agreement can be seen from the fact that the Arbitrator ignored the plain, unambiguous language contained therein. Nowhere in the Last Chance Agreement is there a requirement that just cause exist or that a violation be more than *de minimis*. While these may have been requirements under the collective bargaining agreement, they certainly were not requirements under the Last Chance Agreement. It is ludicrous to argue that the Last Chance Agreement did nothing more than set forth the Respondent's rights under the collective bargaining agreement. If such contention were true, what, then, would be the purpose of executing such an agreement.

Several courts have recognized that last chance agreements supersede the provisions of a collective bargaining agreement, including any just cause provisions contained therein. *Ohio Edison Co. v. Ohio Edison Joint Council*, 947 F.2d 786, 787 (6th

Cir. 1991) (last chance agreements are normally binding in arbitration); *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Local #143*, 894 F.2d 998, 1000 (8th Cir. 1990) (because arbitration board disregarded plain language of settlement agreement, it acted without authority and its award must be vacated); *Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (enforcement of an arbitration award based on a policy outside a last chance agreement properly denied); *Bakers Union Factory, #326*, 749 F.2d 354 (no reason to defer to arbitrator's decision when "a party claims that the chosen means of dispute resolution is private settlement."). Thus, when an arbitrator is called upon to apply a last chance agreement to a dispute, he or she is not free to ignore the plain, unambiguous language of its provisions. *Misco*, 484 U.S. at 38; *Northwest Airlines, Inc.*, 894 F.2d at 1000. Likewise, while it is within the arbitrator's power to determine whether the terms of a last chance agreement have been breached, *Bakers Union Factory, #326*, 749 F.2d at 356, it is *not* within the arbitrator's authority to amend or alter the agreement, *Northwest Airlines, Inc.*, 894 F.2d at 1000. More specifically, an arbitrator may not ignore a penalty that is plainly and unambiguously set forth for a particular misconduct and fashion his own remedy, even if it is felt that the penalty provided is inequitable or unduly harsh. *Northwest Airlines, Inc.*, 894 F.2d at 1000; *Contico Int'l, Inc. v. Local 160, AFL-CIO*, 738 F. Supp. 1262 (E.D. Mo. 1990); *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood, Local 6 of Int'l Alliance of Theatrical Stage Employees & Moving Picture Operators of U.S. and Canada*, 543 F.Supp. 1 (E.D. Mo. 1981), *aff'd*, 715 F.2d 405 (8th Cir. 1983).

The U. S. Court of Appeals for the Seventh Circuit has applied this rationale and declined to give deference to an arbitrator's decision awarding reinstatement of an employee terminated pursuant to a last chance agreement entered into because of the

employee's excessive absenteeism. *Tootsie Roll Indus., Inc.*, 832 F.2d 81. There, the employee was to maintain an acceptable attendance level in accordance with the standards specifically set forth in the last chance agreement, but he failed to do so. The arbitrator, however, refused to apply the attendance standards in the agreement, opting instead to reference the more lenient standards set forth in the collective bargaining agreement. Upon review, the court refused to enforce the arbitrator's decision, holding that:

> We agree with the district court's finding that the arbitrator's conclusion that all aspects of Tootsie Roll's regular attendance policy must apply to the Last Chance Agreement does not draw its essence from the agreement. We are convinced that in using the general attendance policy to find [the employee's] absences excusable, the arbitrator based his award on a policy outside the letter agreement. *In fact, if the parties had intended the regular policy to apply, there would have been no reason for spelling out the very specific attendance requirement contained in the letter agreement* and they would have written such language into the contract with specificity had they so intended. The effect of the arbitrator's conclusion was to eliminate the agreement's provision that [the employee] would be terminated if she was absent "for any reason whatsoever." Thus, the district court properly refused to enforce the arbitrator's award because he failed to follow the clear requirements of the agreement.

Id. at 83-84 (emphasis added).

The Eighth Circuit has also vacated arbitration awards in situations where the arbitrator failed to consider pertinent language in a superseding settlement agreement. *See Northwest Airlines, Inc.*, 894 F.2d 998; *see also George A. Hormel & Co. v. United Food & Commercial Workers, Local 9, AFL-CIO*, 879

F.2d 347 (8th Cir. 1989) (dealing with language in a collective bargaining agreement); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988) (finding that arbitrator disregarded plain, unambiguous language in collective bargaining agreement).

In *Northwest Airlines, Inc.*, a discharged employee was ordered to be reinstated as an equipment service operator by an arbitrator in an unrelated dispute. 894 F.2d 998. The employer, however, refused to do so because the employee did not have a valid driver's license. A settlement agreement was, therefore, entered into providing reinstatement upon the employee's attainment of a license, with the failure to do so to be treated as a voluntary resignation. The employee subsequently failed to obtain a valid driver's license, and, in accordance with the settlement agreement, the employer treated such failure as a voluntary resignation. The arbitration board to which the dispute was submitted, however, found that "the settlement agreement arose out of an arbitration award reinstating [the employee] and that the award dealt with discharge under the `just cause' provision of the collective bargaining agreement." *Id.* at 999. The arbitration board, finding that the employee had not violated the intent and purpose of the settlement agreement, ordered reinstatement. The Court of Appeals, however, after recognizing the general principles previously highlighted, pointed out that the terms of the settlement agreement were plain and unambiguous and, that by disregarding those terms, the arbitration board acted without authority. The court vacated the award. *Id.* at 1000.

Also, in *Sears, Roebuck & Co. v. Automotive Petroleum and Allied Indus. Union, Local 618*, 570 F.Supp. 650 (E.D. Mo. 1983), an arbitrator's decision reducing an employee's discipline from discharge to suspension was vacated because it failed to draw its essence from a last chance agreement. The employee, who was discharged for being rude and discourteous to a cus-

tomer, grieved his discharge and was reinstated under the terms of a last chance agreement providing for immediate termination upon "any reoccurrence of discourteous and rude treatment of customers or obscene and disrespective or subordinate actions with management." *Id.* at 652. The employee was thereafter terminated pursuant to the agreement. The arbitrator found that the employee had in fact violated the last chance agreement by engaging in the prohibited conduct outlined therein. Even so, the arbitrator held that the employer was not justified in terminating him. After finding review of the award to be appropriate under governing federal law, the court stated that, *once the arbitrator determined that the last chance agreement had in fact been violated, he "was without authority to determine the appropriate punishment."* *Id.* at 653 (emphasis added). The Court went on to hold that:

> The penalty by agreement of the parties, is discharge. The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that "[a]ny reoccurrence . . . will result in" discharge . . . In ruling that discharge was an inappropriate punishment, the board exceeded its authority and "dispense[d its] own brand of industrial justice."

Id. at 653-654 (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597). The Court also rejected the notion that "proper cause" was needed under the last chance agreement in order to justify termination, since the agreement clearly specified the conduct giving rise to discharge.

Under the above-cited precedent, it is clear that once the Arbitrator found that Mr. Youngermann had in fact violated the Last Chance Agreement, the Arbitrator's inquiry should have ceased. According to the Last Chance Agreement, an "offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations," constituted, in the words of the Arbitra-

tor, a "triggering event" warranting immediate termination. (Petitioner's APP. I-57; Petitioner's APP. J). The Arbitrator concluded that two of the incidents cited by the Respondent as "triggering events" under the Last Chance Agreement, the DOT violation and the condition of Mr. Youngermann's truck, did not constitute infractions of Category A Rules or Regulations (Petitioner's APP. I-74). It is generally recognized that an arbitrator's "determinations [on these issues] retain the benefit of a deferential standard of review." *Bakers Union Factory, #326*, 749 F.2d at 356. Contrary to the Petitioner's assertions, the Court of Appeals in the case at hand recognized this principle and did not improperly review the merits of the Arbitrator's decision, stating that:

> While we may not agree with the arbitrator's findings on these issues, we "may not reject those findings simply because [we] disagree[ ] with them." *Misco*, 484 U.S. at 38, 108 S.Ct. at 371.

(Petitioner's APP. C-12 and C-14).

Not only did the Court of Appeals give deference to the Arbitrator's determinations as to the occurrence of a triggering event, but it also gave deference to the arbitrator's own determination that he "had [the] authority, upon finding a rules violation had occurred, to determine 'proportionality of discharge *unless the contract mandates an exclusive remedy.*'" (Petitioner's APP. C-12 to C-13; Petitioner's APP. I-57 to I-58). The Last Chance Agreement at issue herein, however, provided for an exclusive remedy, and the Arbitrator improperly applied his own brand of industrial justice by refusing to apply it.

The Arbitrator did, however, find that the failure to clock out was a violation of Company Rule A-10 and that Mr. Youngermann had, indeed, failed to clock out. (Petitioner's APP I-74). At this point, the Arbitrator's authority ended, and so should have his inquiry. The exclusive, bargained for remedy clearly provided

for in the Last Chance Agreement should have been applied. In short, the Arbitrator, after finding a Category A violation, exceeded his authority by altering the clear and unambiguous terms of the Agreement. *See Northwest Airlines, Inc.*, 894 F.2d at 1000. The lower courts did not exceed their authority or contradict established precedent by finding that the decision rendered, therefore, did not draw its essence from the agreement. The Court of Appeals and the District Court did not substitute their own interpretation of the Last Chance Agreement for that of the Arbitrator. Rather, the courts found, in accordance with established precedent, that the Last Chance Agreement superseded the just cause provisions of the collective bargaining agreement and that the Arbitrator's attempt to apply these superseded provisions contravened the plain language of the Last Chance Agreement. Therefore, the Arbitrator's decision was clearly based on matters outside the contract he was asked to interpret.

B. The Routine Judicial Review Of An Arbitration Decision Does Not Raise Special or Important Issues And Does Not Threaten To "Open The Floodgates" Of Litigation

The principle of judicial deference to arbitration awards has been well entrenched in both the common law and the U.S. Arbitration Act since before 1960. *See Burchell v. Marsh*, 58 U.S. 344, 349, 15 L.Ed. 96 (1855); 9 U.S.C. §1, *et. seq.* It was not until 1960, however, that this Court decided to comprehensively deal with the subject of judicial review in what has been deemed the *Steelworkers Trilogy*, *supra.* at N.2. The third case of the *Trilogy*, *Enterprise Wheel & Car Corp.*, dealt specifically with the judicial enforcement of an arbitration award and described the standards a court should apply when asked to either enforce or vacate an arbitration award. 363 U.S. 593. It was in the *Enterprise Wheel* case that this Court established the principle that the merits of an arbitration award should not be

judicially reviewed and that vacation of an award is only proper when it does not draw its essence from the collective bargaining agreement.

It is conceded that a disparity existed among the courts in applying the test for arbitrability established in *Enterprise Wheel*. For this reason, this Court, in 1987, undertook to clarify the circumstances under which judicial review of arbitration awards is proper. *Misco*, 484 U.S. 29. In so doing, not only did the Court clarify its earlier opinion but it also upheld the role of the judiciary as an important facet of federal labor-management law by continuing to recognize the need for judicial review of arbitration awards in limited circumstances.

The decisions by the lower courts in the case at hand do not undermine this Court's decisions on the subject. Neither do they "open the floodgates" of judicial review of all routine arbitration awards, as suggested by the Petitioner. The circumstances under which a court may properly review an arbitration award are very narrow and are deemed inapplicable in most instances. The narrowing of these circumstances as proposed by the Petitioner would, in effect, completely foreclose all judicial review of arbitration decisions. While the Petitioner seems to argue that such foreclosure is a better result, arbitrators would then be free to render decisions unchecked by any means and certainly, in this case, out of touch with the terms of the Last Chance Agreement. It is generally recognized that "the arbitrator's role is to decide disputes in accordance with the contract between the parties rather than on the basis of non-contractual considerations or his own subjective notions of fairness or equity. For that reason, few have suggested that judicial review be absolutely foreclosed." 2 T. Bornstein & A. Gosline, *Labor and Employment Arbitration* §51.01 (1992).

It should be noted that this is not a situation in which intercircuit or intracircuit conflicts exist. Likewise, this is not a case

involving an issue of first impression for this Court or for any of the lower courts involved herein. This is nothing more than a garden variety review of an arbitration award, an issue with which an already overburdened Supreme Court should not be burdened. There is nothing novel in this case. The issue is simply whether the arbitral decision drew its essence from the Last Chance Agreement, and it is universally recognized that judicial review of an arbitration award under such circumstnaces is proper.

Furthermore, the notion that the decisions below "open the floodgates" for judicial review of every routine arbitrator's award is meritless. While it is conceded that the current dockets of most federal courts are overburdened, there is no evidence that the judicial review of arbitration awards in the labor-management relations area has contributed to this phenomenon. There is also no evidence that the continued allowance of judicial review will have a "flooding" effect on the courts as the Petitioner suggests. While the Petitioner cites various figures in support of his argument, these figures deal with the increase of civil cases in general and do not specify what percentage is due to the judicial review of arbitration awards. In his report to the Judicial Conference of the United States in September, 1991, the Director of the Administrative Office of the United States Courts, L. Ralph Meacham, reported that the overall increase in appeals from the U. S. District Court was due mainly to a 5% growth in criminal appeals, a 6% growth in state and federal prisoner petitions, and a 15% growth in bankruptcy cases. 1991 ANNUAL REPORT OF DIRECTOR, at 40. While the percentage of administrative agency cases increased in 1991, the number still remains 6% below that of two years ago. *Id.* Besides, the 1991 increase in administrative appeals has been attributed mainly to appeals filed against the Immigration Naturalization Service, which has been attempting to deport those immigrants with criminal records. *Id.* at 82.

More pertinent to the issue at hand is the fact that of all the cases pending before the U. S. Courts of Appeals in 1991, only 247, or less than 1%, dealt with questions arising under the Labor Management Relations Act ("LMRA"), and only 682 cases, or 2%, dealt with any other labor-related question. Furthermore, there was an 8% decrease in the number of cases dealing with the LMRA pending before the U. S. Courts of Appeals from 1991 to 1990. *Id.* at 166-167. As far as the U. S. District Courts are concerned, only 14,686, or 7%, of the cases commenced in 1991 dealt with labor-related issues, and only 2,032, or less than 1%, dealt with cases involving the LMRA. *Id.* at 190-191. A closer look will also reveal that the number of LMRA cases commenced in the U. S. District Courts has steadily declined since 1987, with a 39% decrease from 1987 to 1991.

Year	No. of LMRA Cases Commenced in U.S District Courts	% Changed From Previous Year
1987	3,323	—
1988	2,880	-13
1989	2,525	-12
1990	2,342	- 7
1991	2,032	-13

Id. at 192-193.

As can be seen from the above statistics, there is simply no support for the Petitioner's contention that the U.S. Courts of Appeal have been "merely giving lip-service to the *Steelworkers Trilogy*," (Petition, p. 19), and that such lip-service is somehow attributable to the burgeoning federal caseload. This Court has made it very clear that the judicial review of arbitration awards is proper in only very limited circumstances, and the U. S. Courts

of Appeal and District Courts have consistently followed this principle, allowing review only in very limited circumstances, such as where the award does not draw its essence from the collective bargaining agreement. The number of labor-related cases commenced and pending in federal courts, particularly those involving the LMRA, has steadily decreased over the past five years, and there is simply no indication that this trend will change. Thus, the argument that the routine review of an arbitration award will somehow add to the overburdening of the federal courts is meritless.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for Respondent acknowledges that three (3) copies of the Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States were served on the following attorney by first-class mail, postage prepaid, on this 2nd day of November, 1992:

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APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2876EMSL

COCA-COLA BOTTLING COMPANY OF ST. LOUIS, INC.,

Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 688, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Appellant.

On Appeal From the United States District Court
For the Eastern District of Missouri,
HONORABLE JEAN HAMILTON, Presiding

BRIEF OF APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case was filed by Plaintiff-Appellee to vacate an arbitrator's award ordering that a discharged employee be reinstated. Defendant-Appellant filed a counterclaim for enforcement of the arbitrator's award. The case was submitted to the District Court on cross motions for summary judgment. The District Court, Hon. Jean Hamilton presiding, properly vacated the award on the basis that the arbitrator's award did not "draw its essence" from the collective bargaining agreement. Appellee requests twenty minutes for oral argument because the case presents substantial factual and legal issues for the Court's review.

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I. PRELIMINARY STATEMENT

This appeal is from the unreported decision of Hon. Jean Hamilton, United States District Court for the Eastern District of Missouri, issued on June 28, 1991, vacating an arbitrator's award to reinstate an employee discharged pursuant to a last chance agreement. App.[1] Jurisdiction of the District Court was invoked pursuant to Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, 28 U.S.C. §§ 1331 and 1337, and 9 U.S.C. §10. This Court's jurisdiction is predicated on 28 U.S.C. § 1291.

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[1] "App." herein refers to the Joint Appendix as designated by counsel for Appellant and Appellee.

II. STATEMENT OF THE ISSUE

Did the District Court correctly vacate an arbitrator's award that did not draw its essence from a negotiated last chance agreement?

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987).

Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Lodge #143, 894 F.2d 998 (8th Cir. 1990).

Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union, 832 F.2d 81 (7th Cir. 1987).

Bakers Union Factory #326 v. ITT Continental Baking Co., Inc., 749 F.2d 350 (6th Cir. 1984).

III. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case was filed by Plaintiff-Appellee on December 14, 1990, seeking to vacate an arbitrator's award ordering the reinstatement of an employee discharged pursuant to a last chance agreement. Defendant-Appellant filed a counter-claim seeking the enforcement of the award. (*See* App. 4-7; 61-64.) The case was submitted to the District Court on Cross Motions for Summary Judgment, and, on June 28, 1991, the District Court issued a Memorandum and Order vacating the arbitrator's award, which the District Court found did not "draw its essence" from the collective bargaining agreement under which the parties were governed. (App. 117-123.) Defendant-Appellant filed a Notice of Appeal out of time by leave of the District Court on July 31, 1991.

B. Statement of Facts

Coca-Cola Bottling Company of St. Louis, Inc. ("Company") is engaged in the production and sale of Coca-Cola and other soft drink products. It employs approximately five hundred (500) employees and has collective bargaining relationships with four (4) labor organizations, including Teamsters Local Union No. 688 ("Union").

As pointed out by the Defendant-Appellant, this proceeding is the result of a series of grievances filed by Kenneth Youngermann, a former employee of the Company. Mr. Youngermann was employed as a driver and was subject to the collective bargaining agreement entered into between the Company and the Union. Pursuant to this collective bargaining agreement, Mr. Youngermann's grievances were submitted to an impartial arbitrator, and ten (10) discrete arbitrations were heard on October 4-6, 1989 and January 30-February 2, 1990. The Arbitrator issued his Opinion and Award on September 17, 1990, which

ordered the reinstatement of Mr. Youngermann because the arbitrator found Mr. Youngermann's discharge to be improper. This conclusion precipitated the filing by the Company of this case now on appeal. (*See* App. 10-60.)

Effective January 18, 1988, the Company implemented its Rules and Regulations and attendant disciplinary procedures, which called for a progressive disciplinary system. These Rules and Regulations establish three (3) categories of violations, each requiring different numbers of violations before termination is warranted. Under the Rules, Category A violations are treated as follows:

First Offense:	Documented counseling warning.
Second Offense::	Written disciplinary warning notification.
Third Offense:	Three (3) day suspension, without compensation.
Fourth Offense:	Ten (10) day suspension, without compensation.
Fifth Offense:	Immediate suspension, without compensation, pending investigation for termination.

(*See* App. 16-21.)

Prior to August 16, 1988, Mr. Youngermann had already received the first four levels of discipline under the five-step procedure for Category A violations. Mr. Youngermann's fifth and dischargeable step was comprised of the following multiple incidents. On August 16, 1988, Mr. Youngermann failed to perform his duties in an efficient manner, resulting in approximately six hours of unwarranted overtime at a rate of $23.17 per hour. On August 17, 1988, Pronto Enterprises, Inc. lodged a complaint with the Company regarding the work performance of

Mr. Youngermann. According to two witnesses, Pronto Enterprises employees Donald Rice and Jeanne Hanneke, Mr. Youngermann threw a "fit" and used profanity in front of customers. Finally, on August 24, 1988, a complaint was received from Wal-Mart Super Center in Washington, Missouri, again regarding Mr. Youngermann's poor work performance. Wal-Mart's Receiving Manager JoAnne Schwoppe, testified that Mr. Youngermann refused to service the store properly and, once again, used profanity in front of customers. Both Pronto and Wal-Mart expressed that they did not want Mr. Youngermann to service their accounts any longer. (*See* App. 28-31.)

On September 6, 1988, a meeting was held with Union Stewards John Becker, Jr. and Gary Tinsley. Attending for the Company were Distribution Manager Jerry Coy, Distribution Superintendent Rick Roustio, and Manager of Human Resources Curt Wacker. During that meeting there was full and complete discussion of the reasons for Mr. Youngermann's impending termination. At the Union's urging, the Company agreed not to terminate Mr. Youngermann but to give him one last chance to reform. Therefore, pursuant to the Union's urging, the Company drafted a disciplinary action notice, which was characterized as a "last chance agreement". (*See* App. 31-32.)

> *Pursuant to the Union's recommendation* on a one time non-precedent setting basis the Company will agree to the following in this situation only: A ten (10) day suspension will be issued to the employee based upon a violation of rule (A-25) poor work performance, including carelessness inefficiency and inattention to duties is prohibited. Additionally, based upon a history of poor work performance demonstrated by this employee the Company believes that the employee does not have the skill and ability to perform satisfactorily in the classification of Extra Relief Driver to which he bid into and is being paid for. The employee has demonstrated an inability to meet standards of production

in quantity and quality of work and the Company is disqualifying the employee from Extra Relief Driver. This is in accordance with Article #14, Section 1 of the current labor agreement between Coca-Cola Bottling Company of St. Louis and Teamsters Local Union #688.

Notwithstanding the above discipline, please be advised that the Company considers a continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination of next occurrence. Accordingly, by issuing the above discipline, the Company is not and does not waive its right to administer greater disciplinary action for similar infractions by any employee in the future.

By this action taken and defined in the above paragraphs, the Company is in no way waiving its rights in accordance with Company Rules and Regulations dated January 18, 1988, specifically in reference to Disciplinary Procedure, wherein it is outlined that a fifth (5th) offense pursuant to Category A violations of Company Rules and Regulations will warrant termination.

Final Notification

Any such offense of a similar and/or like nature in violations [sic] of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis. (*See* App. 21-22.)

This Last Chance Agreement, rather than calling for Mr. Youngermann's termination, provided for a ten (10) day disciplinary suspension and the disqualification of Mr. Youngermann from the position of Extra Relief Driver. The agreement also gave the Company the explicit right to immediately terminate Mr. Youngermann on the happening of any "such offense of a similar and/or like nature" in violation of a Category A Rule or

Regulation. It also spelled out other misconduct which would be prohibited. The document was not only read and signed by Company representatives Rick Roustio and Jerry Coy, but also by Union Stewards John Becker, Jr. and Gary Tinsley. While the Union claimed that Stewards Becker and Tinsley signed only as witnesses, the arbitrator rejected this contention, finding the Union bound to the terms of the Last Chance Agreement. (*See* App. 55.)

Following the execution of the Last Chance Agreement, the Company continued to have problems with Mr. Youngermann's work performance. These problems resulted in a December, 1988, 40-day suspension, without compensation, which was upheld by the arbitrator as justified.

Additional problems following the December 40-day suspension ultimately led to Mr. Youngermann's termination on May 1, 1989. (*See* App. 34-35; 55.) Those events set forth hereinafter which ultimately led to Mr. Youngermann's termination on May 1, 1989, again reflect his inability or unwillingness to comply with job requirements which even the newest employee would find readily achievable. (*See* App. 56-60.) These matters are not before this Honorable Court and are merely recited to allow for a more complete understanding.

The first incident occurred on April 6, 1989, when Distribution Supervisor Steve Juenger was advised by Mr. Youngermann that he did not feel "qualified" to run his route despite years of experience as a delivery driver. Consequently, Mr. Juenger accompanied Mr. Youngermann on his route. On the elementary job duties Youngermann required the direction one would expect of a new hire. Mr. Youngermann had to be directed by Mr. Juenger to take a roll of Norand (computer) paper on his route. Mr. Youngermann took the paper and placed it on the trunk of a parked vehicle. Mr. Juenger asked him to pick it up, to which Mr. Youngermann responded again that he was not qualified to run

the route. Mr. Juenger had to give him a direct order to pick up the roll of paper. Subsequently, at St. Joan of Arc School, Mr. Juenger departed the truck, got the handtruck, and was starting to assist Mr. Youngermann in performing his duties. Mr. Youngermann sat in his truck, refusing to leave, and said, "If Coca-Cola wanted me to have a helper, they would have given me one." When Mr. Youngermann continued to refuse to get out of the vehicle, Mr. Juenger issued a direct order to do so.[2] Only upon being told it was a direct order to get out of the truck, Mr. Youngermann complied. (*See* App. 38-39.)

A second incident occurred on March 28, 1989, when Wal-Mart Store Manager James Carpenter experienced a problem with Mr. Youngermann.[3] Mr. Carpenter testified that he was the Manager of the Wal-Mart store to which Mr. Youngermann made a Coca-Cola delivery on March 28th. Mr. Carpenter testified that he asked Mr. Youngermann if he was going to take the order into the warehouse as usually done. At that point in time it would have meant Mr. Carpenter having to remove the rollers upon which product was being taken from a Wal-Mart truck to the warehouse. Mr. Youngermann responded that ". . . he delivered to the door, and that was as far as it goes". Mr. Carpenter testified he had never had that happen before with a Coca-Cola driver. Mr. Youngermann left the product at the door, and, worse yet, left it in a position that interfered with the Wal-Mart operation. (*See* App. 38-39; 56-57.)

A third situation arose on April 19, 1989, when Mr. Youngermann, along with Steward Becker, was called to a meeting by Distribution Superintendent Roustio. Youngermann's

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[2]We are aware of general prohibitions about supervisors doing bargaining unit work, but given Mr. Youngermann's declarations of ineptitude, compounded by obvious demonstrations of that fact, one can understand Mr. Juenger's desire to help him.

[3]This was documented by a Carpenter memo dated April 11, 1989.

immediate superior, Distribution Supervisor Jeff Ryan, also attended. The evidence is unchallenged, even by the Union, that the purpose of the meeting was remedial, not disciplinary. Mr. Youngermann was handed three (3) memos for instructional purposes which addressed the following issues: the Wal-Mart store incident referenced immediately above; an incident involving Mr. Youngermann spending in excess of one (1) hour and thirty-eight (38) minutes to verify a $2.00 or $3.00 shortage; and his failure to follow two direct orders from Distribution Supervisor Steve Juenger on April 6, 1989, referenced hereinbefore. *See* App. 39; 56-57.) During the meeting Mr. Roustio said Mr. Youngermann became defensive after reading the memorandum. He resisted efforts to use the meeting and memos as positive instructions and opportunities to correct his behavior. After Mr. Youngermann characterized the Company and Mr. Roustio as being ignorant, stupid, and ridiculous, Mr. Roustio, quite candidly testified that he lost his temper and advised Mr. Youngermann he was suspended for "insubordination".

Following that meeting, on April 19th Distribution Supervisor Ryan happened to examine the interior of Mr. Youngermann's vehicle. He found it in total disarray, as depicted in a photo examined by the Arbitrator. Mr. Ryan called Union Stewards Becker and Dick Boss over to examine the truck. They expressed their amazement by one or both inquiring, "Whose truck is this?" (*See* App. 39-43.)

Subsequently, Mr. Roustio learned of other Category A rule violations which had been committed by Mr. Youngermann. He was advised that on April 18, 1989, Mr. Youngermann had failed to punch out at the end of his workday, for which he had been previously warned, and that he had failed to properly fill out a Department of Transportation record. Mr. Youngermann was suspended on April 19, 1989. On April 26, 1989, a Disciplinary Action Notice was filled out, outlining these violations, and a

discharge letter was issued on May 1, 1989.[4] (*See* App. 39-43.) The Company terminated Mr. Youngermann for being in violation of the Last Chance Agreement.

The Arbitrator found that no violation of the Last Chance Agreement had taken place with respect to the condition of Mr. Youngermann's truck did the transposition of numbers on the DOT form. (*See* App. 58.) A violation was found, however, with respect to Mr. Youngermann's failure to clock out at the end of his shift. While the Arbitrator ruled that this violation was *de minimis* and did not warrant discharge, the District Court, on a proper review of the Arbitrator's award, correctly found that the *de minimis* violation was adequate basis for discharge under the terms of the Last Chance Agreement. This appeal was then filed by the Union seeking to reverse the District Court's decision.

IV. SUMMARY OF ARGUMENT

The evidence clearly reveals that the District Court did not exceed the scope of its review in contravention of established precedent of this Court and the United States Supreme Court. The District Court, while unable to address the merits of a dispute, is free to set aside an arbitrator's decision when such decision does not "draw its essence" from the collective bargaining agreement. Such is the case at hand. Finding that the Arbitrator's decision ignored the plain and unambiguous terms of the Last Chance Agreement, the District Court correctly found

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[4]The Union contends that the arbitrator found a "hit list" of employees to have been maintained. (Appellant's Brief p. 4.) That is not true. (App. 54) Union witness James Krueger testified about a "hit list" maintained by the Company. That was vehemently denied by the management witnesses during arbitration. Mr. Krueger's testimony regarding that point should be viewed as coming from a wholly unbelievable witness. The evidence presented at arbitration showed that Mr. Krueger denied having drafting certain comprising documents. This denial was flatly rejected by witness William Storer, a renowned hand writing expert.

that it did not draw its essence from the agreement. Therefore, the District Court's judgment should be affirmed.

V. ARGUMENT

A. Preliminary Remarks: The Law of the Case

The United Sates Supreme Court has made it clear that judicial review of arbitration awards is very limited. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 264, 98 L.Ed.2d 286 (1987); *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Union Workers*, 430 U.S. 243, 253-54, 97 S.Ct. 1067, 51 L.Ed.2d 300, *reh'g denied*, 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). It is generally recognized that courts may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Misco, Inc.*, 484 U.S. at 36. Rather, the courts must give deference to an arbitrator's award unless the award fails to draw its essence from the collective bargaining agreement. *Id.*; *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Thus, where an arbitrator's award has a rational basis rooted in the governing collective bargaining agreement, it should not be overturned, regardless of the fact that the court may have decided differently had it considered the matter in the first instance. *Nolde Bros., Inc.*, 430 U.S. at 253-54. An award will not be found to have drawn its essence from the collective bargaining agreement, however, where the arbitrator has acted in excess of the authority granted to him by the collective bargaining agreement, *Bakers Union Factory, #326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350, 353 (6th Cir. 1984), or where the award is merely the arbitrator's "own brand of industrial justice," *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

The above-mentioned principle reflects the strong federal policy favoring the private settlement of labor disputes. *Misco,*

Inc., 484 U.S. at 37. This policy is clearly set forth in the Labor Management Relations Act, which provides that:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. §173(d) (quoted in *Misco, Inc.*, 484 U.S. at 37). The notion that this policy merely favors the finality of arbitration awards, however, is too narrowly drawn. As the United States Court of Appeals for the Sixth Circuit said:

> The policy in favor of the finality of arbitration is but one part of a broader goal of encouraging informal, i.e., nonjudicial, resolution of labor disputes.
>
> > It is not arbitration per se that federal policy favors, but rather final adjustment of differences by a means selected by the parties. If the parties agree that a procedure other than arbitration shall provide a conclusive resolution of their differences, federal labor policy encourages that procedure no less than arbitration.

Bakers Union Factory, #326, 749 F.2d at 353 (quoting *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3d Cir. 1977)).

Thus, while the Union is correct in pointing out that parties who have bargained for an arbitrator's interpretation of a contract should not be deprived of such interpretation, "[p]arties who reach a settlement pursuant to a formal grievance procedure have not bargained for an arbitrator's construction of the collective bargaining agreement: they have bargained for their own construction." *Id.* at 354. From this it only follows that when the parties' obligations are controlled by a settlement agreement, i.e., a Last Chance Agreement, "the policy in favor of the finality

of arbitration must yield to the broader policy in favor of the parties' chosen method of non-judicial dispute resolution." *Id.*

B. Last Chance Agreement

There is no doubt that the dispute involved in the case at hand is governed by the Last Chance Agreement signed by the Company *and the Union* on September 6, 1988. This agreement was clearly meant to override the terms of the collective bargaining agreement with respect to any further violations including, but not limited to, Category A rule violations by Mr. Youngermann. The Last Chance Agreement clearly states that the Company considers a "continuation of poor work performance, including carelessness, inefficiency, and inattention to duties to be intolerable, warranting termination (sic) of next occurrence" or "any such offense of a similar and/or like nature in violations (sic) of a Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis". (*See* App. 8-9.) There is no requirement that just cause exist or that the violation be more than *de minimis*. Furthermore, the contention that the Last Chance Agreement did nothing more than set forth the Company's rights under the collective bargaining agreement is ludicrous. As the District Court pointed out, it would have been pointless to execute the Last Chance Agreement if such contention were true. Rather, the Last Chance Agreement was intended *by both parties* to give Mr. Youngermann a final chance to perform satisfactorily before termination, in return for the Company's ability to terminate Mr. Youngermann for *any* future violation not subject to a "just cause" test.

Several courts, including this one, have recognized that Last Chance Agreements supersede the provisions of a collective bargaining agreement, and any just cause provisions. *Northwest Airlines, Inc. v. International Ass'n of Machinists and Aero Space Workers, Air Transport Dist. Lodge #143*, 894 F.2d 998

(8th Cir. 1990); *Tootsie Roll Indus., Inc. v. Local Union No. 1 Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81 (7th Cir. 1987); *Bakers Union Factory, #326*, 749 F.2d 350. When an arbitrator has been called upon to apply such an agreement to a dispute, he or she is not free to ignore the plain, unambiguous language of its provisions. *Misco*, 484 U.S. at 38; *Northwest Airlines, Inc.*, 894 F.2d at 1000. Likewise, while it is within the arbitrator's authority to determine whether the terms of a Last Chance Agreement have been breached, *Bakers Union Factory, #326*, 749 F.2d at 356, it is *not* within the arbitrator's authority to amend or alter the agreement, *Northwest Airlines, Inc.*, 894 F.2d at 1000. More specifically, where an agreement plainly and unambiguously sets forth a penalty for particular misconduct, the arbitrator may not ignore the penalty provided for and fashion his own remedy, even if he or she feels that the penalty provided is inequitable or unduly harsh. *Northwest Airlines, Inc.*, 894 F.2d at 1000; *Contico Int'l, Inc. v. Local 160, AFL-CIO*, 135 L.R.R.M. 209 (E.D. Mo. 1990); *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood, Local 6 of International Alliance of Theatrical Stage Employees & Moving Picture Operators of U.S. and Canada*, 543 F. Supp. 1 (E.D. Mo. 1981), *aff'd*, 715 F.2d 405 (8th Cir. 1983).

Under this rationale, the United States Court of Appeals for the Seventh Circuit in *Tootsie Roll Indus., Inc.*, 832 F.2d 81, declined to give deference to an arbitrator's decision awarding reinstatement of an employee discharged pursuant to a last chance agreement. There, the last chance agreement was entered into in lieu of terminating the employee for excessive absenteeism. Under the agreement the employee was to maintain an acceptable attendance level, and the number of permitted absences was specifically stated. The arbitrator, however, refused to apply the plain terms of the agreement. Rather, he referenced the more lenient attendance policy provided for in the collective bargaining agreement and ordered the employee's reinstatement. The court held that the arbitrator's decision did not draw

its essence from the last chance agreement. Specifically, the court provided that:

> We agree with the district court's finding that the arbitrator's conclusion that all aspects of Tootsie Roll's regular attendance policy must apply to the Last Chance Agreement does not draw its essence from the agreement. We are convinced that in using the general attendance policy to find [the employee's] absences excusable, the arbitrator based his award on a policy outside the letter agreement. *In fact, if the parties had intended the regular policy to apply, there would have been no reason for spelling out the very specific attendance requirements contained in the letter agreement* and they would have written such language into the contract with specificity had they so intended. The effect of the arbitrator's conclusion was to eliminate the agreement's provision that [the employee] would be terminated if she was absent "for any reason whatsoever." Thus, the district court properly refused to enforce the arbitrator's award because he failed to follow the clear requirements of the agreement.

Id. at 83-84 (emphasis added).

The Eighth Circuit has also reversed arbitration awards where relevant language in a settlement agreement was not considered by the arbitrator. *See Northwest Airlines, Inc.*, 894 F.2d 998; *see also George A. Hormel & Co. v. United Food & Commercial Workers, Local 9, AFL-CIO*, 879 F.2d 347 (8th Cir. 1989) (dealing with language in collective bargaining agreement); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988) (finding that arbitrator disregarded plain, unambiguous language in collective bargaining agreement). In *Northwest Airlines, Inc.*, the company had been ordered to reinstate the employee pursuant to an arbitration award unrelated to the one then at issue before that court. 894 F.2d 998. The employer

refused to do so because the employee, an equipment service operator, did not have a valid driver's license. The parties thereafter agreed, however, to enter into a settlement agreement offering reinstatement upon the obtainment of a license. Failure by the employee to obtain a license was to be treated as a voluntary resignation. The employee failed to obtain a valid driver's license, and the company treated this as a voluntary resignation pursuant to the settlement agreement. The dispute was submitted to an arbitration board, which found that "the settlement agreement arose out of an arbitration award reinstating [the employee] and that the award dealt with discharge under the 'just cause' provision of the collective bargaining agreement." *Id.* at 999. Determining that the employee had not violated the intent and purpose of the settlement agreement, the arbitration board ordered reinstatement. After recognizing the general principles highlighted earlier, the Court of Appeals pointed out that the terms of the settlement agreement were plain and unambiguous and that the arbitration board, by disregarding those terms, acted without authority. Thus, the award was vacated. *Id.* at 1000.

Likewise, in *Sears, Roebuck & Co. v. Automotive, Petroleum and Allied Indus. Union, Local No. 618*, 570 F. Supp. 650 (E.D. Mo. 1983), the court found that an arbitrator's decision, which reduced an employee's penalty from discharge to suspension, did not draw its essence from the contract. In *Sears, Roebuck & Co.*, an employee was discharged because of rude and discourteous behavior towards customers. 570 F.Supp. 650. The employee grieved his discharge and was reinstated under the terms of a last chance agreement providing for immediate termination upon "any reoccurrence of discourteous and rude treatment of customers or obscene and disrespective or subordinate actions with management." *Id.* at 652. The employee was thereafter found to have engaged in the prohibited conduct and was fired. The arbitrator found that the employee had in fact engaged in the

prohibited conduct, violating the last chance agreement, but that the employer was not justified in terminating him. After reviewing the law concerning a court's scope of review, the court found review in this instance appropriate. The court pointed out that, once the arbitrator determined that the agreement had been violated, he "was without authority to determine the appropriate punishment." *Id.* at 653.

> The penalty, by agreement of the parties, is discharge. The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that "[a]ny reoccurrence . . . will result in" discharge.... In ruling that discharge was an inappropriate punishment, the board exceeded its authority and "dispense[d its] own brand of industrial justice."

Id. at 653-654 (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597). The court also rejected the notion that the last chance agreement required "proper cause" to discharge, finding that the agreement specified the conduct giving rise to termination. Thus, the arbitrator's award was vacated.

As to the case at hand, the thrust of the Union's position is that the Last Chance Agreement executed by Stewards Becker and Tinsley was a nullity. Their claim that they signed merely as witnesses is belied by the plain language of the agreement, the evidence surrounding the meeting in which it was negotiated and signed, and by testimony that negotiated last chance agreements were not uncommon. In fact, the Arbitrator found that the Agreement was valid and binding upon the parties, rejecting the Union's contention. The Union would also have the Court believe that the Last Chance Agreement was not, in fact, a "Last Chance" Agreement. That, too, is wholly unsupported by the facts. The Last Chance Agreement, if not but another step under contractual progressive discipline, must mean something. It is asinine to think it means a sixth step in progressive discipline as the Union would have the Court conclude.

Because the answer is axiomatic, there are few arbitral decisions addressing the authority of unions to negotiate last chance agreements which bind disgruntled or objecting employees. However, in *Sorg Paper Co.*, 89 LA 1237 (Dworkin, 1987), that issue was squarely addressed. There, the employer terminated grievant, relying upon a last chance agreement negotiated with the union. Thereafter, the effectiveness of the last chance agreement was questioned. Arbitrator Dworkin, in addressing whether or not a collective bargaining representative could negotiate away an employee's right to discipline under a "just cause" test, stated the following

> . . . It is apparent to the Arbitrator that the Company's action in this case would not normally withstand critical examination of proper cause. The decision to terminate grievant was mechanical.
>
> * * *
>
> In the abstract, Grievant did not receive the full benefit of proper cause. However, the last-chance decision of the Discipline Control Board [union and management composition] redefined and diminished Grievant's entitlement to proper cause for a probationary year. *Since the decision of the Board constituted a bilateral, negotiated impairment of the Grievant's contractual employment rights, the question to be answered is whether the Company and the Union, acting in concert, were empowered to single out any employee for impaired rights.*
>
> If the Arbitrator were to decide that Grievant was entitled to a full measure of proper cause regardless of what the Discipline Control Board decided, he would effectively abolish the Board. Moreover, he would implicitly hold that no last-chance agreement is valid. The Arbitrator declines to so rule. *Last-chance agreements permit employees to escape terminal discipline provided certain defined condi-*

> *tions are met. Were it not for the negotiated arrangement, Grievant probably would have been justifiably dismissed in December, 1985. Instead, the Company and the Union mutually agreed to an alternative - Grievant's right to demand that the substantive proper cause attend all discipline was sacrificed in exchange for continuing his employment.*
>
> *The parties are entitled to negotiate such resolutions. Proper cause, like any benefit of employment, can be reduced or eliminated through voluntary bargaining. There is nothing sacrosanct about proper cause which exalts it above all other working conditions. It is subject to change through negotiations.*
>
> Grievant did receive some element of proper cause. He was given double-barreled counseling during his probationary period; both supervision and union representatives participated. Every time he was issued a warning he was reminded he was moving closer to losing his job.

Sorg Paper Co., 89 LA at 1241-42 (emphasis added).

The thrust of Arbitrator Dworkin's decision, which is well recognized, is that last chance agreements may entitle an employer to deny an employee the just cause entitlements of the typical labor contract. Once at the termination stage, the employer is faced with an option of discharging the employee or negotiating a special agreement. The grieving employee may not sit back and later seek the best of both worlds, *i.e.*, accept the benefits of a negotiated continued employment under a last chance agreement and yet grieve the very agreement that allows him to maintain his conditional employment status. *See also Scooba Mfg. Co.*, 90-1 ARB ¶81,061 (Hart, 1989) (specially negotiated attendance program for grievant not applicable to other employees permissible – discharge grievance denied).

On September 6, 1988, Mr. Youngermann was to have been terminated, having incurred the fifth (5th) step of progressive discipline — discharge. As found by the arbitrator, the Last Chance Agreement was negotiated, hand drafted, and thereafter typed and executed by Manager of Human Resources Curt Wacker and the Union. The Last Chance Agreement clearly contained, in bold print, the heading "Final Notification," following which was precise language calling for termination for the violation of *any* Category A rule. It also contained a litany of other proscribed conduct. Had the parties merely intended to reiterate their rights under the collective bargaining agreement, all of this would have been unnecessary. On the contrary, actions were taken to deliberately supersede any rights or provisions contained in the collective bargaining agreement. The Last Chance Agreement embodies those actions and is binding on all parties.

There is little question that Mr. Youngermann did not sign the document and, likely, did not concur with the negotiated resolution. But, as found by the arbitrator, that is not the issue. The issue is whether or not the Union, as the certified collective bargaining representative, can negotiate Last Chance Agreements or special arrangements for employees they legally represent. Clearly, the answer is yes. Rules of conduct, collective bargaining agreements, and a host of disciplinary and working condition matters routinely are negotiated by unions with a view to satisfying only a majority of employees. If disgruntled employees may avoid the bargain struck by collective bargaining representatives merely because they do not like it, anarchy has indeed come to the workplace. Here, but for the Last Chance Agreement on September 6, 1988, Mr. Youngermann would have been terminated effective that date. Mr. Youngermann took the benefit of the bargain negotiated by Stewards Becker and Tinsley only to thereafter undercut their authority and the agreement. Candidly, if the approach by this Union is that the

Last Chance Agreement has no legal efficacy and is not binding on them, then it is submitted that effective September 6, 1988, the date of the Last Chance Agreement, Mr. Youngermann was terminated. He and the Union cannot have it both ways.

Under the terms of the Last Chance Agreement, the arbitrator incorrectly limited its range to Category A violations. He ignored the explicit language in the second paragraph which sets forth other proscribed conduct, *e.g.*, poor work performance, carelessness, etc. Moreover, District Court Judge Hamilton in the interest of economy did not address the issues of Mr. Youngermann's trash-filled vehicle or the failure to properly fill out a Department of Transportation form. The arbitrator summarily dismissed them as either having been committed by other employees as well (truck) or as insignificant violation (DOT). (*See* App. 58.) There, too, the test under the Last Chance Agreement is whether the act was committed not whether "just cause" may be examined.

The Union also argues that, even if the Last Chance Agreement is valid and binding, which it was found to be by the Arbitrator, it does not supersede the just cause provisions in the collective bargaining agreement. This contention is contrary to the law previously cited and to the facts of this case. The parties negotiated this agreement at the Union's "recommendation", in an effort to accommodate Mr. Youngermann. Such negotiation would have been pointless had it not been meant to afford more rights than were afforded under the collective bargaining agreement. The Last Chance Agreement clearly provides that termination is justified once *any* Category A violation is found.[5] This provision, as the District Court correctly found, is plain and unambiguous. There is no "just cause" requirement and no requirement that more than a *de minimis* violation be found.

---

[5] As pointed out, that view, correct as it is, does not address the prohibitions included in the second paragraph of the Last Chance Agreement.

Thus, the Last Chance Agreement did provide for more rights than those provided for in the collective bargaining agreement — it provided for Mr. Youngermann's continued employment and the Company's right to terminate him without just cause. The Union could have refused the Last Chance Agreement on September 6, 1988 and arbitrated Mr. Youngermann's termination which otherwise would have been effective that date. It and Mr. Youngermann chose not to and now seek to emasculate the Last Chance Agreement, the fruits of which they accepted for seven (7) months.

The Arbitrator's sole authority was to determine whether a breach of the Last Chance Agreement took place. This breach was found. The Arbitrator correctly found that Mr. Youngermann's failure to clock out was a violation of Rule A-10. (*See* App. 58-59.) This is where the arbitrator's authority ceased, and his finding that the violation of the rule was *de minimis* is irrelevant. *See Tootsie Roll Indus., Inc., supra.* An arbitrator is not free to fashion a remedy where an exclusive remedy, in this case termination, is mandated. The Last Chance Agreement provided for an exclusive remedy — termination. Therefore, the Arbitrator exceed his authority when he ordered the reinstatement of Mr. Youngermann, and the review of his decision was properly before the District Court.

VI. CONCLUSION

The Arbitrator exceeded his authority by fashioning a remedy where an exclusive remedy was provided. The Arbitrator, after finding a violation of Rule A-10, was not free to substitute his judgment as to what punishment was appropriately for the exclusive judgment of the parties. His doing so led the District Court to properly and correctly conclude that the Arbitrator's decision did not draw its essence from the contract, making the District Court's review. Therefore, the District Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the Brief of the Appellee were mailed by ordinary mail on this 23rd day of November, 1991 to the following attorney of record for Appellant.

Clyde E. Craig
Robert K. Sweeney
900 Walnut Street, Suite 520
St. Louis, Missouri 63102

This 23rd day of November, 1991.

MILLER & MARTIN

By: /s/ Ronald G. Ingham
Ronald G. Ingham

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 90-2344-C-7

COCA-COLA BOTTLING COMPANY OF
ST. LOUIS, INC.,
Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 688, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,
Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now Coca-Cola Bottling Company of St. Louis, Inc. and, pursuant to Federal Rules of Civil Procedure, Rule 56, files this motion for summary judgment and says:

(1)

The award issued by Arbitrator Josef Rohlik dated September 17, 1990, did not draw its essence from the collective bargaining agreement and/or the Grievant's last chance disciplinary agreement duly executed by the Union.

(2)

Arbitrator Josef Rohlik concluded that certain conduct was committed by Grievant, but that such conduct did not meet the "just cause" test as set forth in the collective bargaining agreement.

(3)

Under the Last Chance Agreement, which supplanted the "just cause" test of the collective bargaining agreement, the Union, Grievant, and Company agreed that "any" future conduct violation of the Company's Rules of Conduct by Grievant would warrant immediate discharge.

(4)

Arbitrator Josef Rohlik's conclusion that Grievant's admitted failure to punch out in violation of Rule A-10 was to be excused because other employees had done likewise, and the Grievant had "alerted" management of his rule violation before they became aware of such conduct ignores the fact the Last Chance Agreement and Rule A-10 were breached, and, consequently, the award does not draw its essence from that Agreement.

(5)

Arbitrator Josef Rohlik's award violates a well defined public policy by ignoring Department of Transportation regulations that Company vehicle records be properly maintained by employees. The Arbitrator's conclusion that Grievant's "inadvertent transposition" of vehicle numbers on the Department of Transportation documents was not sufficient to be violative of Company Rule A-18 flies in the face of government regulations and public policy. Both the Last Chance Agreement and Rule A-18 were breached, and, consequently, the award does not draw its essence from that agreement.

(6)

Arbitrator Josef Rohlik found that Grievant's truck had not been properly maintained, but that the employer had a mixed history of disciplining or not for such conduct violative of Rule A-1. Such conclusion does not draw its essence from the Last Chance Agreement.

(7)

It is respectfully submitted that under the Last Chance Agreement the Arbitrator's authority was limited to determining whether or not certain conduct had occurred. His authority did not extend to examining whether mitigating circumstances existed; whether there was "just cause" for the termination; whether Grievant's rule violation was an inadvertency; and whether Grievant's violation was *de minimis*.

(8)

Plaintiff submits there is no genuine issue of material fact which would warrant a trial of this matter.

WHEREFORE, Plaintiff submits its motion for summary judgment be granted for the reasons set forth hereinbefore and in the brief in support thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff's Motion for Summary Judgment ~~on Counterclaim and in Support of its Cross Motion for Summary Judgment~~ (/s/ JJM) has been served by first class, prepaid postage upon the below-listed party this 12th day of March, 1991:

Clyde E. Craig, Esq.
Craig & Craig
900 Walnut Street, Suite 520
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/s/ John J. Moellering
John J. Moellering
Attorney for Plaintiff

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 90-2344-C-7

COCA-COLA BOTTLING COMPANY OF
ST. LOUIS, INC.,
Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 688, affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,
Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM AND IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff filed the instant complaint with the Court to set aside a decision of Arbitrator Josef Rohlik under a collective bargaining relationship with Teamsters Local 688 (Teamsters) reinstating a former employee (Grievant) with back pay. Defendant answered and counterclaimed seeking an order enforcing Arbitrator Rohlik's decision. Thereafter, Defendant filed the instant motion for summary judgment, the opposition to which is the subject of this brief. Plaintiff has this date filed its own Motion for Summary Judgment and respectfully submits this brief in support thereof.

Defendant's motion for summary judgment on the counterclaim appears to be based on an unsupported assertion that the

Arbitrator's decision drew its "essence" from the labor agreement and/or there is no dispute as to any material fact. (See motion for summary judgment ¶5 and ¶6.) More is required for the granting of a motion for summary judgment, it is respectfully submitted, than to make bland assertions such as that.

STATEMENT OF THE CASE

Plaintiff has moved to set aside Arbitrator Rohlik's decision based on the fact that a separate agreement or extension of the labor contract had been entered into by Teamsters Local 688 and Coca-Cola Bottling Company of St. Louis under which the Grievant was not entitled to an arbitrator's just cause determinations. Under the "Last Chance Agreement," the arbitrator's authority was limited to determination of whether or not "any" conduct violative of the collective bargaining agreement had been committed.

Informative, although not dispositive of this proceeding, the arbitrator concluded that the Grievant was in fact an "outright bizarre" employee (see arbitral decision, Defendant's Exhibit W, p. 14); that the Company and the discharged employee had been "mismatched" (see arbitral decision, Defendant's Exhibit W, p. 38); that the discharged employee was "generally an uncooperative employee" interested in "endless quarrelling" (see arbitral decision, Defendant's Exhibit W, p. 38); and that the arbitrator had reason to "doubt his ability to be a truck driver" (see arbitral decision, Defendant's Exhibit W, p. 39). Such behavior led to a Last Chance Agreement which was the issue before Arbitrator Josef Rohlik and is now before this Court.

Notwithstanding the characterization of the discharged employee, the arbitrator found, contrary to the "Last Chance Agreement", that Plaintiff did not have "just cause" to terminate the employee which simply missed the issue before him. As will be set forth more fully hereinafter, that position flies in the face of the Last Chance Agreement found to have been duly negotiated

with the discharged employee's collective bargaining representative. In essence, the arbitrator's decision not only didn't draw its "essence from the collective bargaining agreement," it plainly *violated* the supplemental collective bargaining agreement negotiated between the parties relating specifically to Grievant's employment relationship with the Company, *i.e.*, Grievant's Last Chance Agreement. It is unquestioned that if the essence of the arbitrator's award is from the Last Chance Agreement, then this Court may not impose its view although it may have reached a different result in the first instance. See *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). On the facts presented and arguments hereinafter, we think the award drew its essence from the arbitrator not the Last Chance Agreement.

Indeed, the Plaintiff framed this issue before the Arbitrator in its pre-hearing brief to wit:

> "The Company takes the position that the September 6, 1988 'last chance' settlement agreement obviates the need to litigate earlier disciplines, and under the teachings of *Sorg Paper Co.*, 89 LA 1237 (Dworkin 1987); *Inland Container Corp.*, 91 LA 544 (Howell 1988) and *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler 1988), the parties bargained for and agreed on a 'last chance' employment relationship. Proof of any subsequent infraction warrants termination without any just cause inquiry." (See Defendant's Exhibit T, p. 7.)

The "Last Chance Agreement" which the arbitrator found was duly negotiated with Defendant as the "exclusive bargaining agent of the Grievant," and specially found legally efficacious, reads as follows in pertinent part:

FINAL NOTIFICATION

> Any such offense of a similar and/or like nature in violation of Category A Rules and Regulations will warrant your

termination of employment with Coca-Cola Bottling Company of St. Louis.

Arbitrator Rohlik characterized the Last Chance Agreement as follows:

> "All of this [prior disciplines leading to the last chance agreement] evidences the reasonableness of the September 6 solution from what must have been the union point of view. The (sic) December document was also signed by the stewards on the reverse side. The text of the document is unmistakable; it is an agreement between the company and the union on resolution of the situation [impending discharge] which prompted the September 6 meeting." (See arbitral decision, Defendant's Exhibit W, p. 46.)

Following the September 6, 1988 Last Chance Agreement, Grievant engaged in certain conduct which was presented to the arbitrator as the triggering event(s) under the Last Chance Agreement. It was alleged by the Company that Grievant perpetrated the following acts:

(1) On April 18, 1989, he failed to clock out.

(2) On April 19, 1989, he had failed to properly maintain the cleanliness of his truck.

(3) On April 14, 1989, he failed to properly fill out a Department of Transportation form. (See arbitral decision, Defendant's Exhibit W, p. 30.)

The infractions set forth immediately above relate to the following rules of conduct:

> *Rule A-10* - Employees must punch out their time cards when leaving the plant during work time. Time cards must be punched in daily when entering and leaving the building.

Rule A-1 - Each employee is responsible for the orderliness of the area or assigned vehicle in which they work and is asked to keep it clean at all times.

Rule A-18 - Failure to use designated safety devices, equipment, requirements or procedures is strictly prohibited at all times.[1]

Arbitrator Rohlik found that Grievant had in fact failed to punch out his time card, but because he had "alerted" his supervisor to the violation of Rule A-10 after-the-fact, the violation was "de minimis". (See arbitral decision, Defendant's Exhibit W, p. 32 and 50.) Under the September 6, 1988 Last Chance Agreement, the conduct occurred and the rule was violated or it wasn't. The Union's Chief Steward testified he knew of three (3) employees who received disciplinary warnings for not clocking out. Indeed, Grievant himself had been earlier warned. (See arbitral decision, Defendant's Exhibit W, p. 34.)

Arbitrator Rohlik drew the following conclusions with respect to the Grievant's alleged failure to properly maintain his vehicle in violation of Rule A-1:

> "The issue of trash in the cab of the Grievant's truck as a violation of Rule A-1 represents a judgmental matter. Ryan [supervisor] testified that he had seen trucks in such disarray before.[2] (See arbitral decision, Defendant's Exhibit W, p. 49.)

The Union's Chief Steward testified he knew of two (2) employees who had received disciplinary counseling for failure

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[1] (See Defendant's Exhibit B, Rules and Regulations which are not all-inclusive.)

[2] The Arbitrator was shown a picture of the cab's condition (see arbitral decision, Defendant's Exhibit W). Further, there was evidence that other employees have been disciplined for similar conduct.

to maintain clean vehicles. (See arbitral decision, Defendant' Exhibit W, p. 34.)

Arbitrator Rohlik concluded that Grievant had in fact failed to fill out the Department of Transportation form but not as the Company had originally thought. He thereafter stated:

> "Company Rule A-18 requires more than an inadvertent transposition of figures to be involved." (See arbitral decision, Defendant's Exhibit W, p. 49.)

The rule has been applied to direct that employees properly fill out the Department of Transportation form. It is clear from the exhibits submitted by Defendant that Grievant had been previously disciplined for such failure (Defendant's Exhibit R-2). Indeed, Arbitrator Rohlik found that "employees have been disciplined for failure to fill in DOT forms. (See arbitral decision, Defendant's Exhibit W, p. 34.) In fact, Plaintiff's Manager of Human Resources, Curt Wacker, who is charged with Department of Transportation responsibilities, has testified that the inadvertency of errors is no defense (see Wacker Affidavit). Further, directives were sent to all delivery personnel readvising them of the Department of Transportation obligations and the fact that the Company Rules A-18 must be followed (see Wacker affidavit).

For the reasons set forth hereinafter, the Arbitrator was bound by the terms of the negotiated Last Chance Agreement and within the four corners of that document was not empowered to determine whether Grievant's conduct was "de minimis" or others had violated a similar rule with impunity or even whether the decision to discipline was "judgmental". His authority is limited to determining whether or not Grievant's conduct contravened the rule(s).

ARGUMENT AND LEGAL PRECEDENT

In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Supreme Court revisited the circumstances under which arbitral decisions shall be set aside. It reaffirmed that as long as the *essence* of the award came from the labor agreement and is not simply the arbitrator's brand of "industrial justice" the award would not be set aside. See also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The issue here is whether Arbitrator Rohlik drew his decision from the essence of the Last Chance Agreement. As before stated, Arbitrator Josef Rohlik found, as have myriad arbitrators, that last chance agreements can and, in fact, do supersede the just cause provisions of a collective bargaining agreement. See *Sorg Paper Co.*, 89 LA 1237 (Dworkin 1987); *Inland Container Corp.*, 91 LA 544 (Howell 1988); *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler 1988); and *Schafer Bakeries, Inc.*, 89-1 ARB ¶82,052 (Cole 1988). The issue to be resolved is whether under these facts Arbitrator Rohlik drew the essence of his decision from the Last Chance Agreement before him.

This Court has examined whether an arbitrator's decision draws its essence from a labor agreement or whether the arbitrator has simply ignored the plain contract language. See *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986).

More precisely, in *Sears v. Teamsters Local 618*, 570 F.Supp. 650 (E.D. Mo. 1983), this Court examined the issue of whether an arbitrator drew the essence of his decision from a last chance agreement. There, the grievant had been discharged and returned to work under a last chance agreement between the union and employer. The agreement stated that:

> "Any reoccurrence of discourteous and rude treatment of customers or obscene and disruptive (sic) or subordinate

(sic) actions with management will result in immediate dismissal with no further warnings."

The court found that once the arbitrator drew *factual conclusions* that certain conduct had been committed by the grievant *he could not weigh mitigating circumstances* to reduce the discharge to a five (5) day suspension. The court said:

> "The board found that the letter agreement was valid and part of the contract. These conclusions are both rational and correct. *By the terms of the letter, then, once the board determined that grievant had in fact been rude and discourteous to customers, the board was without authority to determine the appropriate punishment. The penalty, by agreement of the parties, is discharge.* The number of credible complaints, which the board here found to be a mitigating circumstance, is irrelevant because the letter provides that '[a]ny reoccurr- ence... will result in' discharge. Arb. Op. at 2. In *ruling that discharge was an inappropriate punishment, the board exceeded its authority and 'dispense[d its] own brand of industrial justice.' United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960). Therefore, the board's decision did not draw its essence from the contract between the parties and must be vacated." (Emphasis added)

In the *Sears* case the arbitrator imposed less than discharge, because the grievant did not understand the last chance letter to still be in force and effect; that grievant's supervisor never warned him that more customer complaints would result in discharge; and that two of three "triggering" complaints about grievant's rude conduct were not "credible." The arbitrator said that if there had only been one complaint he did not believe grievant would have been discharged, and two of the three customer complaints should be discounted because they came

from persons with "standards higher than normal." This court flatly rejected that, concluding the arbitrator simply exceeded the contract and dispensed his own brand of industrial justice. See also, *Northwest Airlines, Inc. v. International Associa tion of Machinists and Aerospace Workers, Air Transport District Lodge #143*, 894 F.2d 998 (8th Cir. 1990).

In the instant case, the Last Chance Agreement recited that:

FINAL NOTIFICATION

> *"Any such offense of a similar and/or like nature in violation of Category A Rules and Regulations will warrant your termination of employment with Coca-Cola Bottling Company of St. Louis."* (Emphasis added)

Arbitrator Rohlik, as before stated, found that certain events occurred for which others had received discipline and on occasion others had not, but that circumstances extant in grievant's case led to the conclusion of no violations or *de minimis* violations.

It is clear that once the Arbitrator found that Grievant failed to punch out in violation of Rule A-10, the inquiry should have ended. It is beyond his authority to opine that Grievant had earlier advised his supervisor that others were not discharged for similar conduct; and that no one raised the subject during a union/management meeting with grievant on April 18th. Rule A-10 says failure to punch in or out is a violation of the negotiated rules of conduct. That decision did not draw its essence from the Last Chance Agreement. The arbitrator simply drafted his own rule that employees may fail to clock out with impunity if they advise supervisors *before* it is discovered. The Court should be mindful that Grievant had received earlier discipline for similar misconduct. (See Defendant's Exhibit R-2.)

It is equally clear that once the Arbitrator found that Grievant's truck had not been maintained in an orderly fashion, the inquiry should have ended. His gratuitous observations that other trucks had been observed in similar condition goes beyond the precise terms of the Last Chance Agreement. Moreover, even under the terms of the collective bargaining agreement encompassing "just cause" concepts, the Union conceded discipline had been issued. (See arbitral decision, Defendant's Exhibit W, p. 34.) The arbitrator's decision that other trucks had been in similar condition thereby excusing such conduct by Grievant simply did not draw its essence from the Last Chance Agreement.

Finally, the Arbitrator's conclusion that the Department of Transportation form had not been filled out properly by Grievant, but not as originally thought by the Company, was not a violation, and was nothing but an "inadvertent transposition" of figures goes well beyond the Last Chance Agreement and federal regulations. The Department of Transportation regulations, as the Court is asked to take judicial notice, require that forms be filled out properly or the employer may be found in violation and fined. Neither the regulations nor the Company rules make an allowance for "inadvertent transpositions". Once having found that Grievant failed to properly fill out a Department of Transportation form, the Arbitrator's authority under the Last Chance Agreement has been exhausted. Any decision ranging beyond that into the equities of the situation similarly does not draw its essence from the Last Chance Agreement.[3]

Further, with respect to the Department of Transportation regulations, under the teachings of *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), as restated in *Misco*, *supra*, arbitral decisions are subject to being set aside if such contravene a well defined public policy. The public policy of employers

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[3] Indeed, even the Union Chief Steward was strict but fair in administering discipline. (See arbitral decision, Defendant's Exhibit W, p. 45.)

being required to maintain, manage and present to the public safe and well maintained fleets of vehicles is beyond question. The U.S. Department of Transportation has that as its primary objective. Toward that end each employer and employee has recordkeeping responsibilities which, if breached, can result in fleets of vehicles being grounded. (See Wacker Affidavit and Exhibit No. 1 thereto.) Grievant breached his personal obligation under the D.O.T. regulations and resultantly so did the Company. The courts have recently become more sensitive and assertive in refusing to enforce arbitral awards where the arbitrator has imposed his own brand of industrial justice breaching a well defined public policy. See *Georgia Power Co. v. Electrical Workers IBEW, Local 84*, 707 F.Supp. 531, 130 LRRM 2419 (D.C. Ga. 1989) (well defined public policy of operating machinery safely breached by award reinstating drug user); *Russell Memorial Hospital Assn. v. Steelworkers*, 720 F.Supp. 583, 132 LRRM 2642 (D.C. Mich. 1989) (well defined public policy of providing safe and competent nursing care breached by award reinstating negligent nurse); *Iowa Electric Light & Power Company v. Electrical Workers IBEW Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987) (well defined public policy of operating nuclear plants safely); *Stead Motors of Walnut Creek v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988) (well defined public policy of automotive repair shop placing safe vehicles on highways breached by an award reinstating mechanic who negligently failed to tighten wheel lugs); and *Newsday, Inc. v. CWA Local 915*, 915 F.2d 840, 135 LRRM 2659 (2d Cir. 1990) (well defined public policy of workplace freedom from sexual harassment breached by award reinstating harasser).

In conclusion, Arbitrator Rohlik endorsed the Last Chance Agreement and then impermissibly injected his view of what was fair and just. It is respectfully submitted that Plaintiff's Motion for Summary Judgment be granted because the decision

of Arbitrator Rohlik did not draw its essence from the Last Chance Agreement and/or is violative of a well defined public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment on Counterclaim and in Support of its Cross Motion for Summary Judgment has been served by first class, prepaid postage upon the below-listed party this 12th day of March, 1991:

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